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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

MARY DANN AND CARRIE DANN,

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Pursuant to a stipulated "valuation date", the Indian Claims Commission assessed damages for the taking of Western Shoshone lands as if title to all such lands in Nevada were taken in 1872. This Court held in *United States v. Dann*, 470 U.S. 39 (1985), that the judgment was paid in 1979. Upon payment, Section 22(a) of the Indian Claims Commission Act gives the Government a "full discharge" of "all claims and demands touching any of the matters involved in the controversy." Absent the "discharge", Indian title to lands occupied by the Dann Band from time immemorial remains unextinguished. The Government seeks to eject the Danns from the subject lands solely by virtue of the "discharge." The questions presented are:

1. Does this Court's earlier decision preclude consideration of all otherwise unresolved issues pertaining to the validity of the "discharge" and its effect on tribal aboriginal title to the subject lands?

2. Was the Western Shoshone land-owning entity adequately represented in the Claims Commission by only one of the many subdivisions of the Western Shoshone Nation and did the lack of representation of the real landowner violate the Danns' right to constitutional due process?

3. If tribal title is precluded, does the "discharge" compel a finding that such title was actually extinguished in 1872 in determining the extent of individual aboriginal rights the Danns have established by continuous use and occupation?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Mary Dann and Carrie Dann respectfully pray that a writ of certiorari issue to review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 27, 1989.

OPINIONS BELOW

The Order and Amended Opinion of the Court of Appeals (App. A, 1-30) is reported at [ ] F.2d [ ]. The Findings of Fact and Conclusions of Law and Judgment of the district court (App. B, *infra*, 26-36) are reported at 13 Ind. L. Rptr. 3158 (Sept. 17, 1986). A prior opinion of this Court in this case is reported at 470 U.S. 39 (1985). Prior opinions of the court of appeals in this case are reported at 572 F.2d 222 (9th Cir. 1978) (*Dann I*) and 706 F.2d 919 (9th Cir. 1983) (*Dann II*).

JURISDICTION

The Order and Amended Opinion of the court of appeals and denial of petitioners' motion for rehearing (App. A) was entered on April 27, 1989. This petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION, TREATY, AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The 1863 Treaty of Ruby Valley, 18 Stat. 689 (1869) is reproduced in Appendix D at App. 38.

Section 22 of the Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) § 70u provides:

> (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commisssion. The payment of any claim, after its determination in accordance with the [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with this [Act] shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

STATEMENT

Mary and Carrie Dann are members of a self-sufficient and autonomous band of Western Shoshone Indians, one of ten "bands" comprising the Western Shoshone Nation. The Dann Band makes its headquarters at the

Dann Ranch in Crescent Valley, Nevada. The Dann sisters and other members of the Dann Band and their predecessors have continuously, openly and notoriously used and occupied the subject lands since time immemorial. The subject lands are a small part of a vast area that was exclusively occupied by the Western Shoshone Nation when political jurisdiction was acquired over the Southwest by the United States from Mexico pursuant to the 1848 Treaty of Guadalupe-Hidalgo, 9 Stat. 922.

In 1863, the United States entered into the Treaty of Ruby Valley, 18 Stat. 689, App. 38, with the Western Shoshone. Congress explicitly instructed the treaty commissioners not to extinguish Western Shoshone title, but to secure safe passage through Shoshone territory for travelers to California, and "a definite acknowledgement as well of the boundaries of the entire country that they [the Indians] claim". *United States v. Dann*, (*Dann I*), 572 F.2d 222, 224 (9th Cir. 1978), quoting *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 347 (1945). The Government wanted the Shoshone to remain self-sufficient in their own territory, (See, Cong. Globe, 37th Cong., 2nd Sess. 2092 (1862)), and anticipated that the Western Shoshone would become herdsmen as game dwindled from the impact of hunting by white men. Treaty of Ruby Valley, *supra*, Art. VII, Finding 6, Findings of Fact and Conclusions of Law (Sept. 17, 1986) [hereinafter "Finding" or "Conclusion"] App. 28.

Mary and Carrie Dann were born on Western Shoshone lands within the Treaty area near the Dann Ranch more than a half-century ago. Beginning in childhood,

they have derived their daily livelihood from the disputed lands by raising livestock and by traditional subsistence activities. Their parents and grandmother also herded stock on the same lands, beginning in the nineteenth century, and their ancestors used and occupied these lands for hundreds of years. Findings 2 and 6, App. 27, 28. The Dann sisters' father, Dewey Dann, homesteaded to protect the Band's base camp and adjacent water supplies from homesteading by white men. Mary and Carrie and other members of the Band now live in homes built on the patented homestead.[1] However, the Band's bathing and laundering facilities, holding pastures, and grazing lands are located on lands the Government now claims as public domain. RT (July 22, 1986) at 97-98, 104-105; Plaintiff's Exhibit 2. ER-122.

The Government filed this action in 1974, alleging grazing trespass to eight sections of land (5120 acres) near the Dann Ranch.[2] On February 22, 1977, the district court held that the Danns were collaterally estopped from asserting Indian title by an interlocutory decision of the Indian Claims Commission in *Shoshone Tribe v. United States*, 11 Ind. Cl. Comm. 387 (1962), which held that the Western Shoshone "were deprived of their lands" by "gradual encroachment by whites, settlers and

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[1] The Dann Band consists of approximately 30 closely-related members, of whom approximately half live on or near the Dann Ranch at any given time. RT (July 22, 1986) at 92-94.

[2] However, the district court order enjoins the defendants "from grazing livestock on the public domain [in excess of certain numbers]" without specifying the lands originally at issue. App. 37.

others . . . " and that "the United States, without payment of compensation, acquired, controlled or treated [Western Shoshone] lands as if they were public lands . . . " *Id.* at 416. (The collateral proceedings in the Indian Claims Commission [hereinafter ICC] are discussed in greater detail *infra* at 10-15.)

On March 15, 1978, the court of appeals reversed, holding that the Danns were not collaterally estopped from asserting unextinguished Indian title because: 1) the decision of the ICC was not a final judgment within the meaning of the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) § 70 *et seq.* (hereinafter "ICCA"), and 2) the issue of whether title was "taken" was neither actually litigated nor actually decided in the proceedings before the Commission. *United States v. Dann [Dann I]*, 572 F.2d 222, 226 (9th Cir. 1978).[3]

On remand the case was resubmitted on cross-motions for summary judgment. The district court held that "[t]he legal effect of the [ICC] judgment for the purposes of the instant case is to extinguish the aboriginal Indian title to the lands of the Western Shoshone Indians . . . " as of December 6, 1979, when the ICC judgment became final. Indian title having endured until 1979, the court dismissed the Government's claim for trespass damages but enjoined the Danns' future use of the "public domain" without obtaining grazing permits. Summary Judgment. (April 25, 1980) ER-19. The district

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[3] This holding was reiterated as the law of the case in *United States v. Dann (Dann II)*, 706 F.2d 919, 23-24 (9th Cir. 1983), *rev'd other grounds*, 470 U.S. 39 (1985).

court stayed the injunction pending appeal "to maintain the status quo ante existing for many years". CR-77.

On appeal, the court of appeals held: 1) because "payment" of the ICC judgment had not occurred within the meaning of Section 22(a) of the ICCA, the Danns were not precluded by that statute from asserting aboriginal title as a defense, and 2) the district court was correct in ruling that Western Shoshone title was not extinguished as a matter of law by application of the public land laws or by the establishment of the Duck Valley Reservation. *United States v. Dann (Dann II)*, 706 F.2d 191 (9th Cir. 1983).

This Court granted a writ of certiorari to review "whether the appropriation of funds into a Treasury account . . . constitutes 'payment' under § 22(a) of the Indian Claims Commission Act . . . " *United States v. Dann*, 470 U.S. 39, 40-41, 44 (1985). The Court answered in the affirmative, and remanded "for proceedings consistent with this opinion." *Id.* at 50.

This Court disagreed with the court of appeals analysis of the "payment" issue on narrow, technical grounds. The court of appeals held that "payment" would not occur until Congress had taken a "final look" at the award and provided for its distribution. This Court, basing its contrary analysis on the legislative history of the ICCA, concluded that Congress intended the ICC to fully relieve Congress of the burden of determining the merits of Native American claims, and that the court of appeals' view would "frustrate [Congress'] purpose of finality by postponing the preclusive effects of § 22(a) while subjecting the United States to continued liability

for claims and demands that 'touch' the matter previously litigated and resolved by the ICC." *Id.* at 45. The Court did not go beyond this narrow holding to decide the legal effect of the "discharge" on the title or the rights of Indians in continuous possession of Western Shoshone lands or whether the claims proceedings met due process standards. Although the Court quoted the Danns' claim that they "possess individual as well as tribal aboriginal rights and that because only the latter were before the Indian Claims Commission, the 'final discharge' of § 22(a) does not bar [them] from raising individual aboriginal title as a defense . . . ", it declined to express an opinion on that issue as well and remanded for proceedings consistent with the opinion. 470 U.S. at 50.

A hearing on a Government motion for preliminary injunction began on July 22, 1986 in the district court. Following approximately five days of testimony, primarily concerning the condition of the range, the court, over the Danns' objection, advanced the trial and consolidated it with the hearing on the motion. RT (July 31, 1986) at 4-10. ER-149-55.

The district court issued Findings of Fact and Conclusions of Law and a Judgment on September 17, 1986. App. 26, 37. The court concluded that Western Shoshone aboriginal title was not extinguished prior to December 19, 1979 (the date of the "payment"), Conclusion 4, App. 33; that the Danns have established "individual aboriginal title" to one section of grazing land and "individual aboriginal and treaty [grazing] right[s]" to their grazing area; Conclusions 9-12; App. 34, 35; and that total abrogation of these rights by the extra-ordinary relief sought by

the Government would be inequitable and contrary to good conscience. Findings 24, 25, App. 32.

The court further found, however, that the BLM "will be unable to effectively manage, protect and improve the public domain unless some limit is placed upon the use of the subject area by defendants", Finding 19, App. 31, and permanently enjoined the Danns from grazing in excess of their 1979 herd size of 768 cattle and 850 horses. Judgment. App. 37.

Both sides appealed. The Danns argued that the "discharge" received by the Government in the ICC relieved the Government of all liability for past wrongs and barred the Indians from all further remedies including one for the return of land, but did not reverse the polarity of liability and create a new cause of action to justify the removal of Indians who had been in continuous possession of tribal lands. The Danns argued that if the ICCA was interpreted so that the "discharge" not only eliminated claims for remedies for past wrongs, but provided the basis for altering the status quo and disrupting possession, then due process standards apply and the judgment of the ICC should be invalidated because the existing property interest of the Western Shoshone was not represented in the ICC. The Danns further asserted that the district court should not have granted even partial equitable relief to the Government because it had achieved whatever legal advantage it had over the Danns by dishonorable means and by violating its treaty promise to provide a reservation before requiring removal.

The Danns further argued that it was an abuse of discretion to consolidate the hearing on the preliminary

injunction with the trial without allowing the Danns to fully develop their evidence on possession or present evidence on the fraud and improper representation issues.[4]

The Government argued that the Danns could have no individual rights of possession under the doctrine of *Cramer v. United States*, 261 U.S. 219 (1923), because: first, that case recognized no rights which could be asserted against the Government and second, because the rights recognized there were based on Government land policies which had changed before "entry" by the Danns, they were not entitled to more land than the 160 acres their father had homesteaded. The Government's analysis depended upon the premise that Western Shoshone title was actually extinguished in 1872 because "the parties in the Commission proceedings stipulated to a valuation date of July 1, 1872, for the Government's taking of tribal aboriginal title . . . " Br. for the U.S. at 26. The Government reasoned that after July 1, 1872, the lands occupied by the Danns were under purview of the public land laws and not the Treaty of Ruby Valley.[5]

The court of appeals reversed, ruling in favor of the Government on all issues except it found that the Danns

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[4] The petitioners' attempt to make a proffer on these issues, which was cut short by the district court, appears in the record at Trans. (July 31, 1986) at 7-10. ER-154-57.

[5] The Government had not, however, either withdrawn its admission that the Treaty was in full force and effect, Finding 4; App. 27, or reasserted its claims for trespass damages for 1973.

did have the right under then applicable public land laws to enter and use public lands up to November 26, 1934, when the area was closed to entry pursuant to the Taylor Grazing Act. The court agreed with the Government that the fact of "payment" of the ICC judgment compelled a finding that Western Shoshone title to the lands used and occupied by the Danns was extinguished prior to 1946 and that July 1, 1872, was the most appropriate date.

The court interpreted this Court's decision on payment and the "negative implications of the Supreme Court's closing instructions in *Dann*" to foreclose any consideration of the issues pertaining to the validity of the "discharge" and its effect upon the tribal aboriginal title to lands in continuous possession of the Danns.

The court of appeals did not address the Danns' equitable arguments or the equitable findings of the district court. It remanded to the district court to determine the extent of use and occupancy by the Danns and their lineal ancestors as of November 26, 1934.

The Government's cause of action in this case depends entirely on the preclusive effect of the "payment" of the judgment awarded in *Western Shoshone Identifiable Group v. United States*, Docket 326-K before the ICC. The ICC proceedings overlapped the case at bar for a period of five years (1974-1979).

In 1951, at the urging of the Bureau of Indian Affairs, certain Shoshone Indians filed a petition pursuant to the ICCA seeking compensation for the "taking" of lands in six large western states. After alleging Western Shoshone aboriginal Indian title to a large tract of land in Nevada and "recognized Indian title" to lands specifically

referred to in the 1863 Treaty of Ruby Valley, *supra*, the petition alleged that "defendant has disposed of a *large part* of the said land to settlers and others, or has seized and converted a *large part* of the said lands to its own use and benefit, without any compensation to the said Western Bands, . . . " *Western Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457, 461-62 (1975) (emphasis supplied).[6]

The ICC determined that the "Western Shoshone identifiable group" held aboriginal title to a tract of land (ultimately determined to be more than 24 million acres) extending from northern Nevada through Death Valley, California. *Id.* at 413-14.

On July 5, 1957, the ICC issued an order allowing the severance of several of the Shoshone claims. Following the October 16, 1962, interlocutory decision of the ICC, the portion of the case seeking compensation for a taking of lands of the "Western Shoshone identifiable group" became Docket 326-K and was captioned *Western Shoshone Identifiable Group, represented by the Te-Moak Bands of Western Shoshone Indians, Nevada v. United States*. However, the true identity of the plaintiff has never been satisfactorily determined. No tribal or political organization corresponding to "the Western Shoshone identifiable group" has ever existed.

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[6] It is noteworthy that the Petition in the ICC did not allege that *all* of the Western Shoshone lands had been taken by settlers and the Government.

It is beyond question that there was strong opposition to the claim strategy by a "significant element",[7] if not the overwhelming majority",[8] of the "Western Shoshone identifiable group" from the very inception, and throughout the course, of the ICC proceeding. The Danns were always prominently associated with the opposition.

The ICC found that the Temoak Bands was organized under the Indian Reorganization Act of 1934, and was "recognized by the Secretary of the Interior as having authority to maintain a suit." *Shoshone Tribe v. United States*, Finding 1, 11 Ind. Cl. Comm. 387-88 (1962). The ICC, however, made no finding that the Temoak Bands had the authority or was the proper party to exclusively represent the entire "Western Bands of Shoshone Indians" or the "Western Shoshone identifiable group", as the Commission called the "land-owning entity". *Id.*, Finding 15 at 403. Despite the fact that the 1962 decision made it obvious that the Temoak Bands comprised only a small part of the "land-owning entity", both the Commission and the Interior Department neglected to make any inquiry or findings on the question whether the Temoak Bands could or should represent the entire "identifiable group" in accordance with any standard, let alone one that meets the minimum requirements of due process.

While the opposition to the claims strategy of the Temoak Bands by the unrepresented portion of the "iden-

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[7] Dept. of Interior Memorandum from Assoc. Solicitor, Indian Affairs, August 12, 1977.

[8] E. Rusco, *Organization of the Te-Moak Bands of Western Shoshone*, XXV Nevada Hist. Soc. Q. 175 (Fall, 1982).

tifiable group" was well known to the Bureau of Indian Affairs,[9] it was not until 1974 that the Western Shoshone Legal Defense and Education Association and Frank Temoke, Chief of the Traditional Council, obtained legal representation and filed a petition in the ICC alleging collusion between the representative entity, the Temoak Bands, and the United States, in that those parties jointly represented to the Commission that all Western Shoshone lands had been taken by the United States when, in fact and law, the greater portion of the lands within the boundaries of the Treaty of Ruby Valley, *supra*, had not been taken.

Despite repeated demands for an evidentiary hearing by the petitioners for intervention, the Commission refused to accept evidence or documents or hear argument concerning the underlying substantive issue of unextinguished Indian title.[10]

During oral argument on intervention, the petitioners' counsel notified the Commission of the continuing use and possession of Shoshone lands by the Danns and other Western Shoshones, and of the pendency of the instant case. The claims lawyer for the "identifiable group" admitted that the Western Shoshone wanted to keep what land they had, but assured the Commission that its action would have *no effect* on existing title or

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[9] Dept. of Interior Memorandum from Assoc. Solicitor, Indian Affairs, August 12, 1977.

[10] Exhibit 8-D Transcript, Ind. Cl. Comm. Docket 326-K (Nov. 14, 1974) at 67-68 and 15. [This exhibit was admitted pursuant to the pre-trial order. See RT (Sept. 8, 1978) at 26-27.]

possession.[11] The Government remained mute, implicitly agreeing with this statement.[12] In fact, the Government vigorously and successfully asserted this same position in *Osceola v. Kuykendall*, 4 Ind. L. Rptr. F-80 (Three-judge Panel, D.C. 1977).

The Commission denied the intervention petition because it found no evidence of collusion in the record made by the parties charged with that collusion. *Western Shoshone Legal Defense*, 35 Ind. Cl. Comm. 457 (1975). This ruling was appealed and the Court of Claims affirmed, primarily because it felt the intervenors were guilty of laches, but also because it believed that "payment" could be delayed until this case resolved the title question. 531 F.2d 495, 502 (Ct. Clms. 1976). This Court denied certiorari. 429 U.S. 885 (1976).

The Temoak Bands reacted to the decision of the Court of Claims by filing pleadings, supported by resolutions of its federally-recognized business council, to inform the Commission that it did not have the authority to, and had not actually, elected to pursue a money award at the risk of losing title to Western Shoshone lands.[13] The Bands moved for a stay to amend the claim, and attempted to discharge the claims lawyer on behalf of the

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[11] *Id.* at 21, 25-26.

[12] The district court found that the Government "had actual notice that the [Danns] were in possession of and using the subject lands . . . and had the opportunity which it failed to exercise, to seek an offset for such lands" in the ICC. Finding 23, App. 31.

[13] Defendants' Exhibit 1, Hearing of February 18, 1977.

entire "identifiable group", all to no avail. The Commission refused the stay without deciding who was in control of the litigation. 40 Ind. Cl. Comm. 304 (1977).

On appeal once again, the Court of Claims refused to reverse the Commission on grounds of the lateness of the supposed "change in position" by the Temoak Bands. *Temoak Bands v. United States,* 593 F.2d 994 (1979) *cert. denied,* 444 U.S. 973. The denial of the Temoak Bands' petition for certiorari concluded the claims case.

REASONS FOR GRANTING THE WRIT

As to the First Question Presented

The Government sought this Court's review of *United States v. Dann (Dann II),* 706 F.2d 919 (9th Cir. 1983) on the question whether, in view of the transfer of funds into a trust account for the Western Shoshone, "the Western Shoshone remain free to assert, in collateral litigation, that aboriginal title to lands covered by the Claims Commission award has never been extinguished." Petition for Writ of Certiorari at (I).

This Court in its decision carefully narrowed the question presented to "whether the appropriation of funds into a treasury account . . . constitutes 'payment' under § 22(a) of the Indian Claims Commission Act, [citations omitted]." 470 U.S. at 40-41, 44. This Court apparently granted certiorari out of concern that the Ninth Circuit's analysis in *Dann II* was in error as to the

intent of Congress in enacting the ICCA and when Congress intended the § 22(a) "discharge" to become effective.

After concluding that "payment" was effected and the discharge invoked when the money was deposited into a trust account under the control of the Secretary of the Interior, this Court noted one of several defenses the Danns have consistently asserted in the lower courts, specifically their claim that they possess individual as well as tribal aboriginal rights. This Court stated:

> . . . this contention has not been addressed by the lower courts and, if open, should first be addressed below. We express no opinion as to its merits. The judgment of the Ninth Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

470 U.S. at 50.

The court of appeals read the above to mean that no issues other than those pertaining to individual aboriginal title could be considered on remand and Western Shoshone tribal title *must be deemed* extinguished. The supervisory power of the Court should be exercised to correct this erroneous interpretation of the Court's mandate which foreclosed the following issues:

1. Whether by continuing to use and occupy Western Shoshone lands, the Danns are making a "claim" against the United States which is precluded by the effect of the "discharge" obtained by the Government under § 22(a) of the ICCA; that is, whether the "discharge" provides an affirmative basis for ejectment.

2. Whether the district court should have allowed the Danns to introduce evidence that the Government practiced, and had actual notice of, fraud on the Western Shoshones during and as a part of the ICC proceedings, and had breached the trust relationship in accepting the award and should therefore be denied the equitable remedy of ejectment of Western Shoshones in possession.[14]

3. Whether the district court was within its perogative in refusing the Government's request for an injunction depriving the Danns of rights established before 1979 because to do so would be inequitable and contrary to good conscience. Findings 24, 25; App. 32.

4. Whether grazing rights based upon continuous livestock grazing by the Danns in the Treaty area are rights reserved under the 1863 Treaty of Ruby Valley, which were not included in the claim before the ICC.[15]

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[14] The court of appeals summarily rejected the Danns' contention that their proffer of evidence on the fraud issue should have been accepted because it "was in support of their claim of tribal aboriginal title." *Dann III* at App. 12, n. 4. The court of appeals ignored the fact that this Court's holding that "payment" was effected when the Treasury on behalf of the Government as judgment debtor transferred money to the Secretary of the Interior as Indian trustee *was premised* on an absence of knowledge of fraud and breach of trust on the part of the Government as payor. 470 U.S. at 49 and n. 12. In the very case relied on by this Court in *Dann* for the rule that a judgment debtor obtains a discharge when he pays a trustee in good faith, this Court remanded for a determination of whether the Government had fraudulent intent. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

[15] In *Santa Fe Pacific v. United States*, 314 U.S. 339, 354 (1941), this Court said " . . . doubtful expressions, instead of

(Continued on following page)

As to the Second Question Presented

The Western Shoshone claim in the ICC was litigated by the Temoak Bands, a small, independent subdivision of the unorganized Western Shoshone Nation, which does not claim authority over the Danns or the lands they occupy.

The ICC held that the Temoak Bands could maintain an action "for and on behalf of the descendants of the Western Shoshone identifiable group," indicating only individuals were represented.[16] *Shoshone Tribe of Indians v. United States*, 11 Ind. Cls. Comm. 387, 446 (1962). The Temoak Bands was not an adequate representative because it only represented "descendants" of the land-owning entity, not the landowner itself, and its objective in the ICC litigation (obtaining money compensation) was in sharp conflict with the interests of the land owning

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being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." 314 U.S at 354. See also *Choate v. Trapp*, 224 U.S. 665 (1912) (doubtful expressions to be liberally construed in favor of Indians); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (treaties to be construed as Indians would have understood them); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174 (1973) (ambiguous expressions are to be resolved in favor of Indians).

[16] However, the ICC did make conclusory statements and holdings in later decisions without stating any supporting findings that the Temoak Bands was the proper representative for the "group" as if it were the land-owning entity. See, *Western Shoshone Legal Defense & Educ. Assoc.*, 35 Ind. Cl. Comm. 457 (1975).

entity and those Western Shoshones, including the Danns, who remained in possession of aboriginal lands. The Danns and other Western Shoshones were denied participation in the ICC proceedings on the grounds that the Temoak Bands was the "exclusive representative", *Western Shoshone Legal Defense*, 531 F.2d 495 (Ct. Cl. 1976), even though the Temoak Bands was not the land-owning entity, and even though the Danns and the rest of the majority of the group are not members of the Temoak Bands and cannot participate politically therein.[17] The Danns' tribal and possessory interests in existing Western Shoshone land rights thus went unrepresented.

The court of appeals rejected this argument on the ground that the "litigation strategy was subject to group

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[17] Section 10 of the Indian Claims Commission Act, *supra* at 1052, § 70(i) provides:

> Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

It is clear from the plain language of the statute that the Temoak Bands Council could exclusively represent its own membership, but not members of other independent, Western Shoshone Bands. *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 954; 203 Ct. Cl. 426, 256-59 (1974); *McGhee v. United States*, 122 Ct. Cl. 380, cert. denied, 344 U.S. 856 (1952).

decision," App. 11, without explaining how the undefined and unorganized "identifiable group" could make a decision and communicate it to the ICC. If determinations of the ICC are to be used to abrogate existing property rights then this Court must review the court of appeals disposition of this important question to determine whether it satisfies the procedural due process of law required by the Fifth Amendment to the United States Constitution.[18]

Due process requires a "full and fair opportunity to litigate." *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 481 (1981), *rehearing denied*, 458 U.S. 1133 (1982). In order to allow a previous proceeding to have preclusive effect on subsequent actions a court must be satisfied with the "quality, extensiveness [and] fairness followed

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[18] Over its 15 year history, this case has generated considerable scholarly comment, most of it critical of the courts' inability to square the procedural due process rights of the petitioners here with the ICCA. *See* Ball, *Constitution, Court, Indian Tribes*, 1987 Am. B. Found. Res. J. 14-16; Coulter & Tullberg, *Indian Land Rights*, 3 Antioch L.J. 153, 177 (1985); Flushman & Barbieri, *Aboriginal Title: The Special Case of California*, 17 Pac. L.J. 391, 455-58 (1986); Hughes, *Indian Law*, 18 N.M.L. Rev. 403, 423-25 (1988); Note, *Aboriginal Indian Title: The Trials of Aboriginal Indian Title and Rights – An Overview of Recent Case Law*, 13 Am. Indian L. Rev. 59, 72-78 (1985); Note, *Aboriginal Title Claims in the Indian Claims Commission: United States v. Dann and Its Due Process Implications*, 13 B.C. Envt'l Affairs L. Rev. 241 (1986); Note, *United States v. Dann: What It Portends for Ownership of Millions of Acres in the Western United States*, 5 Public Land L. Rev. 183 (1984).

in [the] prior litigation." *Montana v. United States*, 440 U.S. 147, 164 n. 11 (1970).[19]

The court of appeals also refused to consider the Danns' attack on the fairness and constitutionality of the ICC proceedings because the ICC had rejected the attempt of the Danns and others to intervene. *Dann III* at App. 10-11. This Court has insisted that a collateral attack is not precluded if "some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case." *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 324-25 (1971).

As to the Third Question Presented

In determining what individual aboriginal rights were established by the Danns as a result of their continuous use and occupancy of the subject lands, the date upon which the public land laws became applicable is critical. The district court below concluded that that date was December 19, 1979 when the payment of the ICC claims occurred and Western Shoshones became precluded from asserting Western Shoshone title. Reversing its own holding in *Dann II* that, prior to payment of the claim, Western Shoshone title was unextinguished and the public land laws were not applicable to Shoshone use and occupancy, the court of appeals concluded that "the most appropriate date for the extinguishment of tribal

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[19] C.f., *Hansberry v. Lee*, 311 U.S. 32 (1940) (initial litigation concerning agreement among various property owners not binding upon non-litigant parties to agreement where there were possible conflicting interests as to enforcement of agreement).

title to the lands in question is the date stipulated by the parties to the claims proceeding for valuation of all lands taken: July 1, 1872." App. 20.

Neither this Court's decision in *Dann* nor the preclusion which results from the discharge compels such a bizarre result. In fact, the court of appeals' analysis is in conflict with the very case this Court cited in remanding the individual Indian title issue, *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339 (1941), cited in *United States v. Dann*, 470 U.S. 39, 50, n. 13 (1985).

In *Santa Fe Pacific*, the date as well as the fact of extinguishment of tribal title was also a critical issue. The Court reviewed a series of actions with regard to Walapai aboriginal lands, for example, the forcible removal of the Indians, 314 U.S. at 354, and Congressional land grants to non-Indians, *Id.* at 345, 348, and found that these blatant "takings" did not effect an extinguishment of the aboriginal title. The Court held that, while Congress has the power to extinguish aboriginal title, it can do so only by action which evidences a clear and plain intent to extinguish that title, and Executive Branch actions, unsanctioned by explicit Congressional action, cannot extinguish title. The Court went on to hold, however, that aboriginal title can also be extinguished by relinquishment. The Court in that case found that the tribe, by requesting and accepting an Indian reservation under pressure from white encroachment on its aboriginal territory, relinquished its aboriginal title.

The court of appeals, misapprehending the ruling of the district court, stated that "the claims award could not itself extinguish title", App. 19, and, since the ICC had

jurisdiction only over wrongs to Indians which occurred prior to August 13, 1946, cast about for an earlier date for the extinguishment of title. Since the ICC had not found any date or event of "taking", (let alone extinguishment satisfying the *Santa Fe Pacific* doctrine), the court of appeals latched upon the date used in the ICC, by stipulation and for convenience, to value the Western Shoshone lands *as if* they were then taken, July 1, 1872. This analysis not only confuses fiction with reality, it equates "taking of lands" with "extinguishment of title" and thereby conflicts directly with the holdings of *Santa Fe Pacific*. The "taking" which could support an award in the ICC falls short of the standard of explicit Congressional action required for extinguishment set in *Santa Fe Pacific*.[20]

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[20] The ICCA permitted the determination of "claims arising from the taking by the United States, whether as a result of a treaty of cessation or otherwise . . . without payment . . . " 25 U.S.C. § 70(a), which is in no way limited to takings where Congress extinguished or the Indians relinquished title. The Western Shoshone complaint in the ICC with regard to unoccupied lands was that the United States "has seized and converted a large part of the said lands to its own use and benefit without compensation . . . " *Quoted in Western Shoshone Identifiable Group v. United States*, 35 ICC 457, 461-62 (1975). The only finding regarding taking was that the "United States, without payment of compensation, acquired, controlled, or treated these lands as if they were public lands." Finding 26, *Shoshone Tribe*, 11 ICC at 416. Such a "taking" certainly would not result in an "extinguishment" under *Santa Fe Pacific* without an agreement to relinquish. The ICC in its own opinions, however, seem to use "taking" and "extinguishment of title" interchangeably and this Court in *Dann* described the ICC as hold-

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What is more, *Santa Fe Pacific* affirmatively suggests how Western Shoshone tribal title might have been extinguished, not by some nebulous encroachment or misapplication of land laws, but by voluntary relinquishment. If the validity and fairness of the ICC proceedings is assumed against all the evidence to the contrary, the election of the claims proceeding as a remedy and the acceptance of the award for the taking of Western Shoshone lands could be construed as a voluntary cession or relinquishment amounting to extinguishment just as was the election by the Tribe in *Santa Fe Pacific* to request and accept a reservation. It was clearly the acceptance of that reservation, not the earlier encroachments that had induced the Indians to seek that settlement, that worked the extinguishment in *Santa Fe Pacific*. If the Western Shoshone relinquished their title, they did so in 1979 when their trustee accepted payment.

Santa Fe Pacific also suggests how the Danns' individual rights of occupancy might survive the relinquishment of tribal title. At the point at which the Court held the aboriginal title of the Walapai relinquished, it was careful to note it was ruling only as to tribal claims:

> As distinguished from individual rights of occupancy, if any, as were involved in *Cramer v. United States, supra*, 261 U.S. 219, but which, not being in issue here, are not foreclosed or affected by the judgment in this case.

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ing that "aboriginal title of the Western Shoshone had been extinguished in the latter part of the 19th century . . . " 470 U.S. 41. However, this use of ICC rubric in dictum surely did not *sub silento* overrule *Santa Fe Pacific*.

314 U.S. at 358, n. 23. By so doing, the Court suggested that its holding of extinguishment of tribal title by relinquishment would not preclude individual Indians who remained on the former tribal lands from continuing to assert their possessory interest after the Tribe had abandoned its title. That is, the rights of individual Indians in open and notorious possession might survive the relinquishment of the underlying tribal title. The court of appeals below, in stark contrast, stated:

> When tribal title has been extinguished and paid for pursuant to the [ICCA], we cannot view the remnants of that tribal title surviving thereafter in individual tribal members.

App. at 14-15.

The decision of the court of appeals also directly conflicts with the stated view of the Court of Claims, in the claims proceeding, that the Indians could "avert the extinguishment of their land claims by final payment", by stopping the appropriation necessary for payment in Congress. 593 F.2d at 999. Thus, in the view of the Court of Claims, extinguishment is the result of payment of the judgment, not the supposed "taking" in the eighteenth century which gave rise to the claim and the award. In the analogous case of conversion, title passes to the convertor at payment although value is determined at the time of taking. PROSSER, TORTS, § 15, n. 10. Even in reverse condemnation where the taking is with lawful authority, title passes at the time of payment. *Kennedy v. Indianapolis*, 103 U.S. 599 (1880).

There is no basis for the court of appeals' holding below that payment of the ICC claim compels a finding that Western Shoshone title was actually extinguished in

1872 simply because the ICC valued the claim as if all Western Shoshone lands were taken then.

In its petition for certiorari to review *Dann II*, at 26, the Government reminded the Court of its oft-stated concern for the stability of judgments and the repose of land titles. The decision below extinguishes one of the oldest titles extant, disrupts individual possession of over a half century and forfeits improvements constructed, not only in good faith, but under right protected by the law of the time.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 28th day of June, 1989.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. MARY DANN; CARRIE DANN, *Defendants-Appellees.*	No. 86-2835 D.C. No. CV-R-74-60 BRT
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARY DANN; CARRIE DANN, *Defendants-Appellants.*	No. 86-2890 D.C. No. CV-R-74-60 BRT ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Bruce R. Thompson, District Judge, Presiding

Argued and Submitted
December 15, 1987 – San Francisco, California

Filed January 11, 1989
Amended April 27, 1989

Before: Betty B. Fletcher, Cecil F. Poole and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

ORDER

We hereby amend the opinion filed January 11, 1989.

In the last paragraph of the opinion entitled "Conclusion" substitute for "Dewey or Sophie Dann" in two places, the words "their lineal ancestors who preceded them in interest."

The petition for rehearing is denied.

OPINION

CANBY, Circuit Judge:

This case is before us once again, this time in the aftermath of a remand from the Supreme Court in *United States v. Dann*, 470 U.S. 39 (1985). Because the parties strongly disagree over which issues remain open for our decision, we must describe, as briefly as we can, what has gone before. It is not a short story.

History of the Litigation

This litigation began in 1974, when the United States filed a complaint against Mary and Carrie Dann alleging that they had trespassed on public lands by grazing their cattle there without a permit from the Bureau of Land Management. The government sought an injunction and damages. The Danns defended on the ground that they were members of the Western Shoshone Tribe of Indians, and that the Western Shoshone held aboriginal title to the land in question.[1]

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[1] The Danns initially claimed treaty-recognized title as well, but this claim was later abandoned. *See United States v. Dann*, 706 F.2d 919, 922 n.1 (1983).

The government responded with two contentions: (1) that the aboriginal title of the Western Shoshone had been extinguished, and (2) that the extinguishment had been conclusively established in proceedings before the Indian Claims Commission. The district court accepted the second contention and granted judgment for the government. On appeal, we reversed. *United States v. Dann*, 572 F.2d 222 (9th Cir. 1978) (*Dann I*). We held that the decision of the Indian Claims Commission was not yet final, and that the bar and merger of res judicata could therefore not yet apply. *Id.* at 225. We also held that issue preclusion could not apply because the question of extinguishment had not been litigated in the title phase of the claims proceeding. *Id.* at 226.

While the case was pending in the district court on remand, the claims proceeding came to an end. Certain aspects of that proceeding have a crucial effect on this trespass case. The claim was brought before the Indian Claims Commission in 1951, by the Temoak Band on behalf of the Western Shoshone identifiable group. It was brought pursuant to the Indian Claims Commission Act, Ch. 959, 60 Stat. 1049 (1946)(codified as amended at 25 U.S.C.A. §§ 70-70v (1963 and Supp. 1982)), which granted the Commission jurisdiction to render damage awards for the taking of aboriginal title, among other wrongs. Its jurisdiction encompassed claims arising on or before August 13, 1946.

In 1974, a group of Western Shoshone, including the Danns, attempted to intervene in the claims proceedings to remove from the claim certain lands that they contended had never been taken. The lands in issue in this

case are among them. The Commission rejected the intervention, and the Court of Claims affirmed, viewing the dispute as an internal one among the Western Shoshone over litigation strategy. *Western Shoshone Legal Defense & Educ. Ass'n v. United States*, 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976). In 1976, the Temoak Band itself changed its strategy and moved for a stay of the claims proceedings in order to seek an administrative declaration that the Western Shoshone still had title to approximately 12 million acres that they originally had claimed to have been taken. The Commission denied the motion and entered its final award. The Temoak Band appealed the denial of the stay, and the Court of Claims affirmed, primarily on the ground that the motion for the stay had been untimely. *Temoak Band of Western Shoshone Indians v. United States*, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979). The Clerk of the Court of Claims then certified the award of approximately $26 million to the General Accounting Office.

The final action of the Court of Claims came after our decision in *Dann I* but before the district court had acted on remand. Informed of the termination of the claim proceedings, the district court again entered judgment for the government, holding that the certification of the award extinguished aboriginal title to the Western Shoshone lands.

On appeal, we again reversed the district court. *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983)(*Dann II*). We adhered to our ruling in *Dann I* that the issue of extinguishment had not been actually litigated in the claims proceedings, but had simply been assumed. We held that merger and bar under common law rules of res

judicata were supplanted by the statutory bar of § 22(a) of the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1055 (1946) which provides in part:

> The payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

We held that this statutory bar did not apply because we concluded that the claim had not yet been paid. The Claim had been certified, an automatic appropriation had followed under 31 U.S.C. § 724a (Supp. III 1979), and the amount of the award had been credited to a Treasury account for the benefit of the Western Shoshone. Despite these facts, and acknowledging the question to be a close one, we held that payment had not been made because further congressional approval would be required for actual distribution of the funds. *Dann II*, 706 F.2d at 925-26.

Having ruled the statutory bar inapplicable, we went on to hold that aboriginal title had not been extinguished as a matter of law by the application of public land laws (including the homestead laws) or the Taylor Grazing Act to aboriginal lands, or by the establishment of the Duck Valley Reservation. *Dann II*, 706 F.2d at 928-33.

The government asked the Supreme Court to review our ruling that the statutory bar did not apply because "payment" had not been made. The Supreme Court reversed our decision. *United States v. Dann*, 470 U.S. 39 (1984). The Court's unanimous opinion stated:

> To hold, as the court below has, that payment does not occur until a final plan of distribution has been approved by Congress would frustrate the purpose

> of finality by postponing the preclusive effects of § 22(a) while subjecting the United States to continued liability for claims and demands that "touch" the matter previously litigated and resolved by the Indian Claims Commission.

470 U.S. at 45. After thus rejecting our interpretation of the statutory bar, the Supreme Court added:

> The Danns also claim to possess individual as well as tribal aboriginal rights and that because only the latter were before the Indian Claims Commission, the "final discharge" of § 22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action. Though we have recognized that individual aboriginal rights may exist in certain contexts,[14] this contention has not been addressed by the lower courts and, if open, should first be addressed below. We express no opinion as to its merits.
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> 14. *Cramer v. United States*, 261 U.S. 219, 227 (1923); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 357-358 (1941); see generally Cohen, Original Indian Title, 32 Minn. L. Rev. [28], 53-54 [1947].

470 U.S. at 50. Upon receiving the mandate of the Supreme Court, we remanded to the district court for further proceedings consistent with the Supreme Court's opinion.

In the district court, the government moved for a preliminary injunction. The court, after hearing evidence, combined the motion with one for a permanent injunction and entered final judgment largely favoring the Danns. The court found as facts that the lands in question had been aboriginal lands of the Western Shoshone, and that the Shoshone occupation of those lands had been recognized in the Treaty of Ruby Valley, 18 Stat. 689 (1869). It

found that in the 1920's, defendants' father, Dewey Dann, had begun herding livestock on the open range in Crescent Valley, Nevada. In the 1930's,[2] Dewey and his wife, Sophie Dann, obtained a homestead patent to 160 acres and subsequently purchased one section from the Southern Pacific Railroad. The Danns' ranch is currently located on those tracts. When adjacent lands were incorporated into a grazing district under the Taylor Grazing Act, Dewey Dann inquired whether he was required to obtain grazing permits and pay grazing fees for his stock. According to the district court's findings, Dewey was erroneously advised that he must obtain permits and pay fees, and he did so from 1936 until his death. His operation, carrying the " '29' " brand, has since passed to the defendants.

The district court also found that in the 1940's, defendant Mary Dann began herding stock in the area, and was joined by her sister, Carrie, in the 1950's. This operation carried the "3M" brand. As of 1979, the 3M operation was grazing 598 head of cattle, plus calves, and 840 head of horses, plus foals, "on Western Shoshone ancestral lands within the boundaries of the 1863 Treaty of Ruby Valley." Defendants have neither sought nor obtained permits for the 3M operation. Other ranches also ran stock, under grazing permits, on lands used originally by Dewey Dann as well as those used by the 3M operation.

In its conclusions, the district court ruled that the aboriginal title of the Western Shoshone had not been

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[2] The district court found that Dewey and Sophie Dann obtained their homestead patent "in the 1930's." The government asserts that the patent was issued in 1928.

extinguished prior to December 19, 1979, the date that the claims award became final. It ruled that the claims judgment precluded the Danns from asserting the Western Shoshone aboriginal title, but that the Danns had established individual aboriginal title, prior to 1979, to the exclusive occupancy of one section of grazing land. The district court further held that Dewey Dann had established aboriginal individual rights to graze 170 head of cattle, plus calves, and 10 head of horses, plus foals, and that Mary and Carrie Dann had established individual aboriginal rights to graze 598 head of cattle, plus calves, and 840 head of horses, plus foals, all such grazing rights to be held in common with permittees of the Bureau of Land Management on the lands in dispute. The aboriginal grazing rights were not to be subject to regulation by the Bureau.

This appeal

Both parties now appeal the district court's decision and injunction. The government appeals the ruling that the Danns have established individual aboriginal rights to exclusive occupancy of one section and grazing rights in other sections. The Danns appeal the district court's interpretation of the effect of the claims award. They also contend that the district court erred in limiting the Danns' grazing rights to the numbers and species of stock that they grazed in 1979. Finally, the Danns contend that the district court improperly proceeded to final judgment, denying the Danns' request for an opportunity to present further evidence. For the most part, we agree with the government's view of the case. We conclude that the decision of the district court must be reversed.

Tribal aboriginal title

We would have thought that the Supreme Court's decision would have shifted the focus of this case away from tribal aboriginal title and placed it squarely on individual aboriginal title. The Danns continue, however, to rely heavily on Western Shoshone aboriginal title. A great deal of their argument on this appeal is devoted to an attack on the claims proceedings and to an attempt to limit the effect that the claims award must be given under the Supreme Court's decision in this case. The Danns concede, as they must, that the statutory discharge and merger provision of § 22(a) of the Act, ch. 959, 60 Stat. 1049, 1055 (1946), now applies to all claims touching upon the Western Shoshone aboriginal title controversy. Yet they accord the claims decision very little effect. The Danns state:

> The issue, then, is what effect "full discharge" had upon the unextinguished and unabandoned Western Shoshone title to lands which were being used and occupied openly, notoriously and continuously by Western Shoshone Indians at the time the discharge occurred.

Danns' brief p.24. The Danns then go on to argue that a statutory bar does not affect one who is in possession asserting a defense to trespass.

It is true that the Supreme Court's opinion was largely confined to the point that a claim that was certified, appropriated and credited to a tribal account in the Treasury was "paid" within the meaning of § 22(a) of the Act, ch. 959, 60 Stat. 1049, 1055 (1946). But the Court's discussion did not take place in a vacuum; it was a ruling in this very case where the issue was whether § 22(a)

barred the Danns' defense to the government's trespass claim. The Supreme Court's opinion was not advisory.

In our opinion in *Dann II*, we had referred to our earlier case of *United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976), "where we ruled that payment of a claim removed any ambiguity that title had previously been extinguished." *Dann II*, 706 F.2d at 925. We distinguished *Gemmill* on the ground that payment had been distributed in that case, so there had been no need to rule on whether mere appropriation constituted payment. Now that the Supreme Court has made it clear that the Western Shoshone claim has been paid, we cannot avoid the rule of *Gemmill* that payment for the taking of a aboriginal title establishes that that title has been extinguished. Even without *Gemmill*, however, we would be directed by the negative implications of the Supreme Court's closing instructions in *Dann*. The Court remanded the question of individual aboriginal title in response to the Danns' argument "that because only [tribal aboriginal rights] were before the Indian Claims Commission, the 'final discharge' of § 22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action." The Supreme Court's language makes little sense unless § 22(a) bars a defense based on tribal aboriginal rights.

Moreover, the Danns' contention that the lands they occupy were not subject to the claims proceeding was rejected in that litigation. As we stated earlier, the attempt of the Danns and others to intervene was rejected, and the rejection was upheld on appeal. *Western Shoshone Legal Defense & Educ. Ass'n v. United States*, 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976). A

similar contention belatedly asserted by the Temoak Band was similarly rejected. *Temoak Band of Western Shoshone Indians v. United States*, 593 F.2d 994 (Ct.Cl.), *cert. denied*, 444 U.S. 973 (1979). The Danns attack the fairness and constitutionality of these rulings, but they overlook the fact that the interest they assert in tribal aboriginal title is not a direct property interest of their own. *See* F. Cohen, *Handbook of Federal Indian Law* 183-84 (1942). The Danns were simply part of a litigating group with regard to the claims proceeding, and litigation strategy was subject to group decision.

The Danns rely on *Osceola v. Kuykendall*, No. 76-492 (D.D.C. Mar. 11, 1977), *excerpted at* 4 Indian L. Rep. F-80,[3] in which one of a group of Seminoles in possession of lands in Florida attacked a claims proceeding that was adjudicating a claim for the taking of all Seminole aboriginal title in that state. The district court rejected the attack as premature, stating that the plaintiff's possession had not yet been disturbed and that his group's "right of possession and occupancy will not be affected by the [claims] judgment." *Id.* at F-82. We do not read the district court's memorandum opinion as clearly holding that members of a tribe in possession when that tribe's title is extinguished nevertheless retain a tribal right of occupancy. The district court appeared to be leaving open the possibility that plaintiff could demonstrate that his group as an entity separate from the Seminole Nation possessed their land from time immemorial, and therefore had their aboriginal title. *See id.* If, contrary to our understanding,

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[3] A full report of the district court's opinion in *Kuykendall* was submitted by the Danns as a separate appendix.

the district court in *Osceola* meant that tribal members occupying tribal land after the tribe's title was extinguished could still assert that tribe's title, the ruling is flatly inconsistent with the Supreme Court's decision and mandate in *Dann*. Conflict or not, we are naturally bound to follow the Supreme Court's direction that the Danns cannot assert Western Shoshone title as a defense to the government's trespass claim.

We reject, therefore, the Danns' attempt to continue to rely on the defense of tribal aboriginal title.[4] That leaves for decision the question whether the Danns may successfully claim individual aboriginal title.

Individual aboriginal title

Individual aboriginal title is by no means a well-defined concept. The common view of aboriginal title is that it is held by tribes. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). Among the most important protections of aboriginal title were the Trade and Intercourse Acts, which invalidated transfers of title from *tribes* without the approval of the United States. *E.g.*, 25 U.S.C. § 177 (1983). Thus individual Indians do not even have standing to contest a transfer of tribal lands on the ground that the transfer violated that statute. *James v. Watt*, 716 F.2d 71 (1st Cir. 1983), *cert.*

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[4] In connection with our rejection of their claims based on tribal aboriginal title, we also reject the Danns' contention that the district court erred in denying their request for an opportunity to present additional evidence. The evidence the Danns sought to introduce was in support of their claim of tribal aboriginal title.

denied, 467 U.S. 1209 (1984). Nevertheless, the Supreme Court has pointed out in *Dann* that it has "recognized that individual aboriginal rights may exist in certain contexts," *Dann*, 470 U.S. at 50. We therefore consider the possible nature and scope of such an individual title.

There is no theoretical reason why individuals could not establish aboriginal title in much the same manner that a tribe does. An individual might be able to show that his or her lineal ancestors held and occupied, *as individuals*, a particular tract of land, to the exclusion of all others, from time immemorial, and that this title had never been extinguished.[5] *Cf. United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941)(exclusive occupation of ancestral home by Walapai Tribe would establish aboriginal, or "Indian," title).

Whether any such individual aboriginal title has existed or could exist, we need not decide, for it is clear that the Danns make no such individual claim to these lands from time immemorial. In their answer to the trespass complaint, the Danns pleaded that the lands in issue were beneficially owned "by the defendants and other members of the Western Shoshone Tribe," and requested a declaration that "the Western Shoshone tribes of Indians are the recognized beneficial owners of the land." In their

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[5] We reject the government's argument that aboriginal title can never be asserted against the government. Aboriginal title can be extinguished only by Congress or with the authorization of Congress. *Dann II*, 706 F.2d at 928-29. If an executive official or agency attempts to extinguish aboriginal title without any congressional authorization, the titleholder must be able to protect the title by asserting it against the official or agency.

brief on this appeal, the Danns disavow any claim of individual possessory interest; they assert only tribal interests of the Western Shoshone Nation or the Dann Band of the Western Shoshone. Danns' brief p.25 n.24. Indeed, the Danns' entire attack on the claims proceeding is directed toward rescuing the aboriginal title of the Western Shoshone to these lands from the effect of the claims award. Finally, the findings of the district court state that the lands in question are "within the area exclusively used and occupied by the Western Shoshone Nation at the time [of] the Treaty of Guadalupe-Hidalgo," when the territory was acquired by the United States from Mexico. The findings further state that, in exercising their grazing rights, both Dewey Dann and Mary and Carrie Dann were asserting the rights of the Western Shoshone Nation to their aboriginal lands.

It is beyond question, then, that the aboriginal rights to these lands were tribal until they were extinguished. As individual tribal members occupying land under tribal original title, the Danns or their lineal ancestors could assert no rights excluding the tribe or its members from the land they were occupying. *See* F. Cohen, *Handbook of Federal Indian Law* 183 (1942); *F. Cohen's Handbook of Federal Indian Law* 605-06 (1982). And because the rights they assert are tribal, the Danns could just as easily lay claim to any of the 22 million acres of aboriginal Western Shoshone land in Nevada as they do to the tracts at issue in this case. The problem with the claim, as we have already pointed out, is that the Western Shoshone have been paid for that title, and it must be deemed extinguished. When tribal title has been extinguished and paid for pursuant to the Indian Claims Commission Act, we

cannot view the remnants of that tribal title as surviving thereafter in individual tribal members. Any such notion would be contrary to the intent of Congress finally to determine tribal land claims and to protect the United States from continued liability for claims that "touch" the matter litigated before the Claims Commission. Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1055 (1946); *see United States v. Dann*, 470 U.S. 39, 45 (1985).

There is another possible and much narrower meaning of individual aboriginal title, however, It can be derived from the most relevant case cited by the Supreme Court at the end of its opinion in *Dann*. The case is *Cramer v. United States*, 261 U.S. 219 (1923), and the individual Indian title it protected was not aboriginal in the usual sense of long or indefinite duration.

In *Cramer*, three Indians had occupied some 175 acres of public land since shortly before 1859. In 1866, the United States granted land that included the 175 acres to a railroad, with an exception for any of the land "found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of." *Id.* at 225 & n.1. In 1904, a patent to the disputed land was issued to the railroad. Subsequently, the three Indians brought suit to cancel the patent. At the time the Indians had settled on the land, Indians were not eligible to acquire public land by entry and settlement under the homestead or other land laws. The Supreme Court stated, therefore, that the lands could not be viewed as having been sold or granted; the question was whether they had been " 'reserved . . . or otherwise disposed of.' " *Id.* at 227. The Court then pointed out that it had always been

the policy of the government to respect the Indian right of occupancy, and added:

> It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight.

Id. The Court then held the Indians entitled to the 175 acres they had actually occupied and enclosed, but not to the entire subdivided tract, as the circuit court had held. *Id.* at 234-36.

It is apparent from the passage quoted above, and from other statements in the opinion, that the decision in *Cramer* was based on the Court's view that recognition of title was consistent with federal land and Indian policy of the time. From this fact, the government contends that once the homestead laws were extended to Indians in 1875, Act of March 3, 1875, ch. 131, 18 Stat. 402, 420 (1875), no Indian could obtain title to more land by entry than was permitted under the homestead acts. Because Dewey Dann obtained fee title to 160 acres under the homestead act, the argument goes, he could acquire no more by occupancy.

We do not accept the government's contention limiting the quantity of land that may be individually

acquired under the rule of *Cramer*. The nature of the title recognized by *Cramer* appears to be more fragile than that obtained under a homestead patent. While the *Cramer* opinion does not so state, it appears that the Indians' occupancy title was subject to extinguishment by the United States, as is other Indian "aboriginal" title. The decree of the district court in *Cramer*, which was affirmed in relevant part by the Supreme Court, directed the railroad not to interfere with the Indians' occupation so long as they remained on the land "or until the United States shall otherwise direct." *United States v. Cramer*, No. 398 (N.D. Cal. 1920), appended to government's brief. It does not follow that a limitation of 160 acres of fee land obtainable under the homestead laws is applicable to the different and extinguishable estate resulting from Indian occupancy. Indeed, the 175 acre tract of the Indians in *Cramer* appears to have exceeded the 160 acre limit that would have been applicable under the 1862 Homestead Act if it had applied. *See* Act of May 20, 1862, ch. LXXV, 12 Stat. 392 (1862).

There is a larger point to the government's argument, however. *Cramer* was built upon the government's policy, at the time, favoring land settlement in general and Indian occupancy in particular. The Court stated that the Indians' right of occupancy "flows from a settled governmental policy" of recognizing pre-existing rights in public lands (including non-Indian rights) even though they were not perfected. *Cramer*, 261 U.S. at 229.

> In our opinion the possession of the property in question by these Indians was within the policy and with the implied consent of the Government.

Id. at 230. This implied consent arose from a background of homestead acts designed to encourage entry and settlement on vacant government lands. Those laws were extended to non-tribal Indians in 1875, Act of March 3, 1875, ch. 131, 18 Stat. 402, 420, and to all Indians in 1884, Act of July 4, 1884, ch. 180, 23 Stat. 76, 96 (1884). These extensions did not, in our view, preclude acquisition by Indians of non-statutory rights of occupancy; there is certainly no hint in the *Cramer* opinion that it dealt with a right no longer capable of arising. The statutes favoring entry and settlement, like the provisions for Indian allotments on unappropriated public lands, *see* 25 U.S.C. §§ 334, 336 (1983), were nevertheless fundamental to the Court's conclusions in *Cramer*.

The policy of public land settlement that underlay *Cramer* no longer exists. In 1934, Congress departed from its prior policy favoring entry and settlement of unappropriated public lands. The Taylor Grazing Act, 43 U.S.C. §§ 315-315r (1986), authorized the Executive to establish grazing districts that had the effect of withdrawing unappropriated public lands from settlement. In 1934, the President withdrew public lands in twelve states, including Nevada, from entry and settlement. Exec. Order No. 6910 (1934). All lands in twelve additional states were withdrawn in 1935. Exec. Order. No. 6964 (1935). Lands are not available for homestead or allotments for Indians unless the Secretary of Interior classifies the land for that purpose. 43 C.F.R. §§ 2400.0-3 (1986); *see Hopkins v. United States*, 414 F.2d 464, 470-72 (9th Cir. 1969). An Indian who settles the land cannot acquire an allotment if the Secretary has not so designated; he is a mere trespasser under current law. *See Kale*

v. United States, 489 F.2d 449 (9th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974).

In short, an Indian cannot today gain a right of occupancy simply by occupying public land, as the Indians did in *Cramer*. Under current law, that occupancy could not be viewed as undertaken with the implied consent of the government, as was the occupancy in *Cramer*. We therefore conclude that any individual occupancy rights acquired by the Danns must have had their inception prior to November 26, 1934, the date that the lands in question were withdrawn from entry by Executive Order No. 6910.

The district court made no findings concerning whether any of the Danns had established occupancy of the disputed tracts prior to November 26, 1934, because the district court viewed the pivotal date as December 19, 1979, when the Western Shoshone claim was paid.

When tribal title was extinguished

The district court erred in ruling that the Western Shoshone aboriginal title had not been extinguished until 1979. As we pointed out in *Dann II*, the claims award could not itself extinguish the title. *Dann II*, 706 F.2d at 928. The Claims Commission had no jurisdiction to extinguish title on its own authority; it simply had jurisdiction to award damages for takings or other wrongs that occurred on or before August 13, 1946. Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1050 (1946)(as amended Pub.L. 93-494, §2, 88 Stat. 1499, 1499-1500 (1974)). The extinguishment of tribal title must be deemed to have occurred no later than that date.

The government argues that the most appropriate date for the extinguishment of tribal title to the lands in question is the date stipulated by the parties to the claims proceeding for the valuation of all the lands taken: July 1, 1872. We agree that this is the most appropriate date. As the Supreme Court stated in *Dann*, the Indian Claims Commission had entered an order in the claims proceeding holding that "the aboriginal title of the Western Shoshone had been extinguished in the latter part of the 19th century." *Dann*, 470 U.S. at 41-42 (citing *Shoshone Tribe v. United States*, 11 Ind. Cl. Comm'n 387, 416 (1962)). It is true that the taking was not actually litigated, *see Dann I*, 572 F.2d at 226; *Dann II*, 706 F.2d at 919 (1983), but the payment of the claims award establishes conclusively that a taking occurred. From the claims litigation, we can only conclude that the taking occurred in the latter part of the nineteenth century.[6]

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[6] Even if the claims litigation had not militated in favor of a nineteenth century taking date, aboriginal tribal title to these lands could not have continued all the way to August 13, 1946. The last significant federal actions before 1946 that could reasonably have effected a taking were the passage of the Taylor Grazing Act in 1934 and the incorporation of the lands into a grazing district shortly thereafter. The taking would have to be deemed to have occurred by then.

It is true that in *Dann II* we ruled that the passage of the Taylor Grazing Act and the incorporation of the land in a grazing district would not extinguish title, *Dann II*, 706 F.2d at 932, but that was before the Supreme Court ruled that the claims award had been paid and that aboriginal title must be deemed extinguished. In *Dann II*, we pointed out that when the issue is the *time* of taking, rather than the *fact*, inclusion in a grazing district may be chosen as fixing the date of extinguishment. *Id.* (citing *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct.Cl. 1975)).

The Danns' individual rights of occupancy

Any individual rights of occupancy asserted by the Danns consequently arose long after the tribal aboriginal title of the Western Shoshone to the lands in issue must be deemed to have been extinguished. Dewey and Sophie Dann and their descendants were eligible to enter public unappropriated lands in Nevada prior to their withdrawal from settlement on November 26, 1934, and to acquire an individual right of occupancy on those lands under the rule of *Cramer v. United States*, 261 U.S. 219 (1923). To establish such an individual right of occupancy, the Danns must show actual possession by occupancy, inclosure [sic], or other actions establishing a right to the lands to the exclusion of adverse claimants. *See id.* at 236 ("This is in accordance with the general rule that possession alone, without title or color of title confers no right beyond the limits of actual possession."). We do not deem it fatal, however, to an indivdial right of occupancy that the Indian took actual possession under an invalid claim of tribal title. *See Miller v. United States*, 159 F.2d 997, 1005 (9th Cir. 1947)(erroneous claim of original Indian title does not defeat right of individual occupancy). With the tribal title extinguished, the individual Indian taking possession may acquire an occupancy right within the rule of *Cramer*.

The district court also found that the Danns had an aboriginal and treaty right of user to graze cattle and horses in common with others on specified public lands. *Cramer* itself does not address user rights; it dealt only with a right of occupancy of land and carefully restricted the right to land actually enclosed and occupied by the individual Indians. *Cramer*, 261 U.S. at 234-36. The point

of *Cramer*, however, is that it recognizes a national policy of encouraging Indians to adopt domestic pursuits, such as those encouraged by the public land laws regarding settlement. The rule of *Cramer* is not inconsistent with recognition of a grazing right in individual Indians, acquired prior to subjection of the lands in question to the regime of the Taylor Grazing Act. Analogous cases have recognized that prior occupancy by individual Indians may create enforceable preferences under subsequent statutory allotment acts. *See Aguilar v. United States*, 474 F.Supp. 840 (D. Alaska 1979); *Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315 (D. Alaska 1985); *cf. Miller v. United States*, 159 F.2d 997 (9th Cir. 1947)(possession recognized by 1884 statute for government of Alaska). We conclude that the district court was correct in ruling that Dewey and Sophie Dann could and did acquire individual aboriginal use rights to graze cattle and horses on open range lands later incorporated into grazing districts. Any such aboriginal right, however, must have been acquired prior to the withdrawal of the lands from open grazing and their subjection to the regime of the Taylor Grazing Act. The right also must have been continuously exercised since that time. *See United States v. 10.95 Acres of Land*, 75 F. Supp. 841 (D. Alaska 1948) (rights under 1884 statute recognized in *Miller, supra*, lost by lack of continuous occupation).

The district court held that Dewey and Sophie Dann held an aboriginal right to graze 170 head of cattle, plus calves, and 10 horses, plus foals, upon the public domain. It also held that Mary and Carrie Dann had individual aboriginal rights to graze 598 head of cattle, plus calves, and 840 head of horses, plus foals, on public lands. Most

of this livestock appears, however, to have been introduced onto public lands well after the lands were subjected to the administration of the Taylor Grazing Act. Dewey Dann's first application for a grazing permit in 1935 sought permission to graze 21 cattle and 79 horses in common with the livestock of other named ranches. To the extent that the district court recognized aboriginal grazing rights for numbers and types[7] of animals beyond those grazed by the Danns at the time the lands were incorporated into grazing districts under the Taylor Grazing Act, it erred.

We also conclude that the district court erred in ruling that individual aboriginal grazing rights of the Danns were wholly exempt from regulation by the Bureau of Land Management. Even Indian treaty rights, when shared with others on the public lands or waters, are subject to reasonable regulation that is shown to be essential to the conservation of the common resources and does not discriminate against the Indians. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968); *Antoine v. Washington*, 420 U.S. 194, 207 (1975). To that limited extent, the individual aboriginal grazing rights of the Danns are subject to regulation by the Bureau of Land Management.

The Danns also claimed, and the district court agreed, that they enjoyed grazing rights under the Treaty of Ruby Valley, 18 Stat. 689 (1869). There are two answers

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[7] In their cross-appeal, the Danns contend that the district court erred in not permitting interchangeability of cattle and horses. They offer no supporting authority and we find no error.

to this contention. The first is that the Treaty of Ruby Valley conferred no individual rights; the parties to the Treaty were only the Western Shoshone and the United States. The second is that the Treaty does not refer to grazing rights, but only to lands generally claimed by the Western Shoshone[8]; any grazing rights were simply included by implication in the lands claimed. Tribal title to those lands, however, was the subject of the Western Shoshone claims litigation. Payment of that claim bars the Danns from asserting the tribal title to grazing rights just as clearly as it bars their asserting title to the lands. The district court accordingly erred in holding that the Danns held treaty grazing rights.

Conclusion

The decision of the district court is reversed. The individual aboriginal land title of Mary and Carrie Dann is restricted to land that they or their lineal ancestors who preceded them in interest actually occupied prior to November 26, 1934. The individual aboriginal grazing rights of Mary and Carrie Dann are restricted to the number and type of animals grazed by them or by their lineal ancestors who preceded them in interest at the time that the lands in question were incorporated into a grazing district, shortly after the passage of the Taylor Graz-

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[8] The Supreme Court has described the Treaty of Ruby Valley as one of a series that acknowledged the territories claimed by the Shoshones without "recognizing" title so as to establish a property interest compensable under the Fifth Amendment. *Northern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 348 (1945).

ing Act in 1934. Because the district court, under its view of the case, made no findings regarding the status of the Dann claims at those determinative times, we remand for such further proceedings as the district court deems necessary to reach the requisite findings and to enter a judgment or decree accordingly. It follows from what we have said that we deny the Danns relief on their cross-appeal.

No. 2835 REVERSED AND REMANDED.

No. 2890 AFFIRMED (Cross-Appeal).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Civil No. R-74-60 BRT

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARY DANN AND CARRIE DANN,

Defendants.

Filed September 17, 1986

Findings of Fact and Conclusions of Law

The plaintiff's motion for a preliminary injunction having come on for hearing before the Honorable Bruce R. Thompson, United States District Judge, on the 22nd, 23rd, 24th, 25th and 31st days of July, 1986, the plaintiff being represented by Patricia L. Weiss and Andrew F. Walch and the defendants being represented by John D. O'Connell, Thomas E. Luebben and James S. Anaya, and

the court having heard the evidence presented by the parties, ordered the trial of the action advanced and consolidated with hearing on the motion pursuant to Rule 65(a)(2) over the objection of the defendants and heard the arguments of counsel and being fully apprised and having rendered an oral decision from the bench, hereby enters its:

Findings of Fact

1. The defendants Mary Dann and Carrie Dann are Western Shoshone Indians who reside, with other members of the extended family known as the Dann Band of Western Shoshone Indians, at the Dann Ranch, in Crescent Valley, Nevada.

2. The lands which are the subject of this action are part of a larger area which was occupied by the defendants' ancestors for many generations in a nomadic manner.

3. The subject lands are within the area exclusively used and occupied by the Western Shoshone Nation at the time that the Treaty of Guadalupe-Hidalgo, 9 Stat. 922 (1848), was ratified and are within the boundaries recognized as Western Shoshone territory in the 1863 Treaty of Ruby Valley, 18 Stat. 689 (ratified Oct. 21, 1869).

4. The government has admitted that the 1863 Treaty of Ruby Valley is in full force and effect.

5. Article VI of the 1863 Treaty of Ruby Valley has not been implemented by the President of the United

States by establishing a reservation for the Western Shoshone Indians within their ancestral territory as described in the Treaty.

6. In the nineteenth century, some Western Shoshones, including the defendants' grandmother, Mary Hall, began augmenting their traditional hunter-gatherer subsistence by herding livestock. This adaption of lifestyle was anticipated by the United States as evidenced by article VII of the 1863 Treaty of Ruby Valley and was with the consent and knowledge of the government.

7. In the 1920s, the defendants' father, Dewey Dann, began herding livestock on the open range in Crescent Valley, Nevada. In the 1930s Dewey Dann and his wife, Sophie Dann, obtained a homestead patent to the north half of the south half of Section 34, T. 29 N., R. 49 E., M.D.B., and subsequently acquired title to the adjoining Section 33 by purchase from the Southern Pacific Railroad.

8. When the Department of the Interior began enforcing the Taylor Grazing Act of 1934, 43 U.S.C. § 315b (1982), in the area, through the Elko District Grazier of the United States Grazing Service, Dewey Dann inquired as to whether he, as a Western Shoshone Indian, was required to comply with the Act. He was erroneously informed by Interior Department personnel that he would have to obtain a grazing permit and pay grazing fees to the federal government pursuant to the Taylor Grazing Act. Relying on these erroneous representations, Dewey Dann obtained a federal grazing permit for his livestock business, the " '29' Operation," pursuant to the Taylor Grazing Act and paid grazing fees under the Act

from 1936 until his death. Dewey Dann's herd eventually consisted of 170 head of cattle, and 10 head of horses, plus calves and foals.

9. Dewey Dann did not sign the 1966 range adjudication agreement for the South Buckhorn Allotment because he was continuing to assert aboriginal Western Shoshone rights to use and occupy Western Shoshone ancestral lands as well as treaty rights under the Treaty of Ruby Valley.

10. At the time of the commencement of this action, ownership of the " '29' Operation" had passed to Dewey Dann's wife, Sophie Dann, upon his death and, upon her death, to her estate, which was administered by the defendant Mary Dann. Ownership of the " '29' Operation" has since passed to the defendants Mary Dann and Carrie Dann, and other heirs of Sophie Dann, all of whom are members of the Dann Band of Western Shoshone Indians.

11. Mary Dann began herding livestock in Crescent Valley and surrounding areas in the 1940s. She was joined in partnership in that business in the 1950s by her sister, Carrie Dann. The defendants registered the "3M" brand with the state of Nevada in 1961. In the 1960s the " '3M' Operation" ran 80 to 140 head of cattle, plus calves, and 400 to 800 head of horses, plus foals. During the 1970s the " '3M' Operation" increased the size of its cattle and horse herds. As of December 19, 1979, Mary and Carrie Dann were grazing 598 head of cattle, plus calves, and 840 head of horses, plus foals, on Western Shoshone ancestral lands within the boundaries of the 1863 Treaty of Ruby Valley.

12. Since 1979, the " '3M' Operation" cattle herd has increased to 1169 head, plus calves, while its horse herd has been decreased to 555 head, plus foals.

13. The defendants have not sought or obtained permits from the United States Department of the Interior, Bureau of Land Management for the " '3M' Operation," but have consistently asserted an aboriginal and treaty right as Western Shoshone Indians to graze livestock on Western Shoshone ancestral lands.

14. The use and occupancy of the open range for livestock grazing by Dewey Dann, the Dewey Dann Estate, the Sophie Dann Estate, Mary Dann and Carrie Dann, was open, notorious and under a claim of aboriginal Western Shoshone title and of rights recognized and confirmed by the 1863 Treaty of Ruby Valley. Such use of the open range was in common with other non-Indian livestock operators.

15. Grazing livestock in common on the open range is a long-established practice in many areas of Nevada and is a workable and practical system of land use in areas such as Crescent Valley where fencing is uneconomical.

16. Certain lands within the South Buckhorn Allotment are claimed as private lands by third parties, but neither title to, nor the use of, such lands, is at issue between the parties here.

17. By virtue of fencing, irrigation and other acts of possession, Mary Dann and Carrie Dann established exclusive use and occupancy to Section 4, T. 28 N., R. 49 E., M.D.M., prior to 1979.

18. Any damage to localized areas of the public range caused by defendants' livestock is not irreparable.

19. The Bureau of Land Management will be unable to effectively manage, protect and improve the public domain unless some limit is placed upon the use of the subject area by defendants.

20. On December 6, 1979, the United States Court of Claims certified to the United States Treasury Department its judgment awarding $26,145,189.89 in *Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Shoshone Indians, Nevada v. United States,* Docket 326-K before the Indian Claims Commission. That judgment, in part, was for the liability of the United States for the taking of the lands of the Western Shoshone Nation.

21. On December 19, 1979, the United States Treasury Department made payment to the Secretary of the United States Department of the Interior of the $26,145,189.89 awarded in Docket 326-K.

22. The Secretary of the Interior established an interest-bearing account in the name of the Temoak Band of Western Shoshone Indians into which such funds were deposited.

23. The government, in *Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Shoshone Indians, Nevada v. United States, supra,* had actual notice that the defendants here were in possession of and using the subject lands under claim of Western Shoshone title and treaty rights and had the opportunity, which it failed to exercise, to seek an offset for such lands.

24. The extraordinary relief sought by the government would eliminate the defendants' ability to support themselves by their own labor and the defendants are ill-suited by age, experience and culture to seek other employment.

25. It would not be equitable and it would be contrary to good conscience to deprive the defendants of individual aboriginal and treaty rights which were established by continuous use and possession prior to December 19, 1979.

Conclusions of Law

1. At the time that political jurisdiction over the southwestern United States was acquired by the United States from Mexico, pursuant to the Treaty of Guadalupe-Hidalgo, 9 Stat. 922 (1848), aboriginal title to the lands which are the subject of this lawsuit was in the Western Shoshone Nation.

2. The subject lands are within the boundaries recognized by the United States in article V of the 1863 Treaty of Ruby Valley, 18 Stat. 689 (ratified Oct. 21, 1869) as defining the territory of certain bands of the Western Shoshone Nation. The Treaty of Ruby Valley was in full force and effect at the inception of this litigation.

3. The President of the United States having failed to establish a reservation for the Western Shoshone Indians within their territory as provided in article VI of the 1863 Treaty of Ruby Valley, the Western Shoshones had a treaty right to use and occupy, including the right to graze livestock thereon, the lands within the treaty

boundaries which had not been occupied by non-Indians in accordance with article VI of the Treaty.

4. Prior to December 19, 1979, the aboriginal title of the Western Shoshone Nation to the subject lands had not been extinguished or abandoned and such lands have been used and occupied continuously by the defendants and their ancestors pursuant to aboriginal title and treaty rights.

5. The defendants are precluded from asserting the aboriginal title of the Western Shoshone Nation against the United States because of the effect of section 22(a) of the Indian Claims Commission Act resulting from the payment, on December 19, 1979, of the judgment in *Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Shoshone Indians, Nevada v. United States, supra.*

6. Since individual aboriginal title or other individual use rights, particularly to lands in actual possession of individual Indians, were not in contention in the Indian Claims Commission, the assertion of such rights is not precluded by section 22(a) of the Indian Claims Commission [Act].

7. Individual aboriginal title or other individual aboriginal or treaty rights to use or occupy public domain lands within Western Shoshone territory must have been established prior to December 19, 1979, and any subsequent effort by individual Western Shoshones to extend their individual occupancy or use could not extend the scope of established use and occupancy rights.

8. Individual aboriginal title, being the right to exclude others from the occupancy of discrete lands, must be established by the lawful occupancy in an open and notorious manner of discrete lands by individual Indians to the exclusion of others.

9. The defendants, as Western Shoshone Indians, have established individual aboriginal title to Section 4, of T. 28 N., R. 49 E., M.D.M. and that section is not unappropriated public domain subject to the Taylor Grazing Act or the Federal Land Management Policy Act. The defendants have not established the right to exclusive occupancy to any other public domain lands.

10. The defendants have established an individual aboriginal and treaty right to graze 598 head of cattle, plus calves, and 840 head of horses, plus foals, in common with permittees of the Bureau of Land Management upon the public domain within the South Buckhorn Allotment and adjacent allotments.

11. Dewey and Sophie Dann had an aboriginal and treaty right to graze livestock upon the subject lands. The submission to Bureau of Land Management regulations by Dewey Dann and his estate and Sophie Dann's estate was induced by misinformation by government agents and made under protest and with assertion of aboriginal title and treaty rights. Such submission could not diminish aboriginal and treaty rights and the defendants as heirs to Dewey and Sophie Dann have individual aboriginal and treaty rights, in common with the other heirs, to graze an additional 170 head of cattle, plus calves, and 10 head of horses, plus foals, upon the public domain in

common with permittees of the Bureau of Land Management.

12. The exercise of the afore-described individual aboriginal and treaty rights to graze livestock on the public domain is not subject to regulation by the Bureau of Land Management.

13. The government is entitled to an injunction prohibiting the defendants from grazing livestock on the public domain, without complying with the Bureau of Land Management regulations, in excess of the numbers hereinabove identified.

14. In the event the court's order to advance and consolidate the trial on the merits with the hearing on the government's motion for preliminary injunction is reversed, or the matter is otherwise remanded for trial, the final injunction issued in accordance with these findings shall be deemed a preliminary injunction unless otherwise ordered by the appellate court.

Judgment

The court after trial has concurrently herewith filed its findings of fact and conclusions of law.

Accordingly,

It hereby is ordered, adjudged and decreed that defendants Mary Dann and Carrie Dann are permanently enjoined and restrained from grazing on the public domain within the South Buckhorn Allotment of the Elko Grazing District and adjacent allotments more than 170 head of cattle, plus calves, and 10 head of horses, plus foals, with the "29" brand, and more than 598 head of

cattle, plus calves, and 840 head of horses, plus foals, with the "3 M" brand.

The court reserves jurisdiction to modify and amend this order, from time to time, as shall be made to appear reasonable and just.

/s/ Bruce R. Thompson
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Civil R-74-60 BRT
Plaintiff,

J U D G M E N T

vs.

MARY DANN and CARRIE DANN, (Filed Sep. 15, 1986)
Defendants.
_____/

The court after trial has concurrently herewith filed its findings of fact and conclusions of law.

Accordingly,

IT HEREBY IS ORDERED, ADJUDGED AND DECREED that defendants Mary Dann and Carrie Dann are permanently enjoined and restrained from grazing on the public domain within the South Buckhorn Allotment of the Elko Grazing District and adjacent allotments more than 170 head of cattle, plus calves, and 10 head of horses, plus foals, with the "29" brand, and more than 598 head of cattle, plus calves, and 840 head of horses, plus foals, with the "3 M" brand.

The court reserves jurisdiction to modify and amend this order, from time to time, as shall be made to appear reasonable and just.

DATED September 15, 1986.

/s/ Bruce R. Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX D

[TREATY OF RUBY VALLEY]

TREATY WITH WESTERN BANDS OF SHOSHONEE INDIANS

Treaty between the United States of America and the Western Bands of Shoshonee Indians. Concluded October 1, 1863; Ratification advised, with amendment, June 26, 1866; Amendment assented to June 17, 1869; Proclaimed October 21, 1869.

ULYSSES S. GRANT, PRESIDENT OF THE UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

Whereas a Treaty was made and concluded at Ruby Valley, in the Territory of Nevada, on the First day of October, in the year of our Lord one thousand eight hundred and sixty-three, by and between James W. Nye and James Duane Doty, Commissioners, on the part of the United States, and Te-moak, Mo-ho-a, Kirk-weedgwa, To-nag, and other Chiefs, Principal Men, and Warriors of the Western Bands of the Shoshonee National of Indians, on the part of said bands of Indians, and duly authorized thereto by them, which Treaty is in the words and figures following, to wit:

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A.D. one thousand eight hundred and sixty-three, between the United State of America, represented by the undersigned Commissioners, and the Western Bands of the Shoshonee

Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE I.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE II.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States; and of all emigrants and travelers under its authority and protection, without molestation or injury from them. And if depredations are at anytime committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and

convenience of travellers or for the mail or telegraph companies.

ARTICLE III.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hinderance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employees of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific Ocean, it is stipulated by said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE IV.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building or other purposes in any part of the country claimed by said bands.

ARTICLE V.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-bo Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE VI.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE VII.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceeding stipulations, and of their faithful observance by the said bands, the United States promise and agree to

pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE VIII.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to ___ thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

s/JAMES W. NYES/
s/JAMES DUANE DOTY

s/TE-MOAK
s/MO-HO-A
s/KIRK-WEEDGWA
s/TO-NAG
s/TO-SO-WEE-SO-OP
s/SOW-ER-E-GAH
s/PO-ON-GO-SAH
s/PAR-A-WOAT-ZE
s/GA-HA-DIER
s/KO-RO-KOUT-ZE
s/POM-GE-MAH
s/BUCK

Witnesses:

J.B. MOORE, Lt. Col. 3d Inf. Cal. Vol. JACOB T. LOCKHART, Indian Agent Nev. Ter. HENRY BUTTERFIELD, Interpreter.

And whereas, the said Treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-sixth day of June, one thousand eight hundred and sixty-six, advise

and consent to the ratification of the same, with an amendment, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES

June 26, 1866

Resolved, (two-thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the Treaty of peace and friendship made at Ruby Valley, in the Territory of Nevada, the first day of October, A.D. one thousand eight hundred and sixty-three, between the United States of America, represented by their Commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, with the following

AMENDMENT:

Fill the blank in the 8th article with the word "five".

Attest:

s/J.W. FORNEY, Secretary

And whereas, the foregoing amendment having been fully explained and interpreted to the undersigned Chiefs, Principal Men, and Warriors of the Western Bands of the Shoshonee Nation of Indians, they did, on the seventeenth day of June, one thousand eight hundred and sixty-nine, give their free and voluntary assent to the said amendment, in the words and figures following, to wit:

Whereas the Senate of the United States, in executive session, did advise and consent to the ratification of the Treaty of peace and friendship, made at Ruby Valley, in the Territory of Nevada, on the first day of October, one thousand eight hundred and sixty-three, by the Commissioners on the part of the United States and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, with the following amendment:

"Fill the blank in the 8th article with the word 'five'."

And whereas the foregoing amendment has been fully interpreted and explained to the undersigned Chiefs and Principal Men and Warriors of the aforesaid Western Bands of the Shoshonee Nation of Indians, we do hereby agree and assent to the same.

Done at Ruby Valley, Nevada, on this 17th day of June, A.D. 1869.

s/TIM-OOK
s/BUCK
s/FRANK
s/CHARLEY TIMOOK
s/TO-NAG

ATTEST:

J. H. DAWLEY
R. B. SCOTT
W. R. REYNOLDS
LOUIS GRINNELL, Interpreter

Now, therefore, be it known that I, ULYSSES S. GRANT, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-sixth of June,

one thousand eight hundred and sixty-six, accept, ratify, and confirm the said Treaty, with the amendment as aforesaid.

In testimony whereof, I have hereto signed my name, and have caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-first day of October, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-fourth.

[Seal]

s/U.S. GRANT

By the President:
Hamilton Fish,
Secretary of State

Supreme Court, U.S.
FILED
SEP 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-24

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARY DANN AND CARRIE DANN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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RICHARD B. STEWART
Assistant Attorney General
JACQUES B. GELIN
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QUESTIONS PRESENTED

1. Whether the government's payment of an Indian Claims Commission judgment awarding compensation for the extinguishment of tribal title to certain lands bars individual Indians from asserting tribal title as a defense in a trespass action involving the lands.

2. Whether petitioners were inadequately represented in the Indian Claims Commission proceeding.

3. Whether tribal title to the lands was extinguished in 1872 or in 1979.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW AND PRIOR OPINIONS

The amended opinion of the court of appeals (Pet. App. 1-25) is reported at 873 F.2d 1189. The findings of fact and conclusions of law of the district court (Pet. App. 26-36) are not reported. A prior opinion of this Court in this case is reported at 470 U.S. 39. The prior opinions of the court of appeals are reported at 763 F.2d 379, 706 F.2d 919, and 572 F.2d 222.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1989. A timely petition for rehearing was denied on April 27, 1989, and an amended opinion was entered that same day (Pet. App. 1-2). The petition for a

writ of certiorari was filed on July 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The lands involved in this case are part of a much larger area which was at issue in an action resolved by the Indian Claims Commission in 1977.[1] That action was filed in 1951 on the behalf of various Shoshone tribal groups to recover damages for the loss of aboriginal title to lands in the Western United States, including Nevada. The Temoak Band of Shoshone Indians was recognized by the Commission as the tribal representative for the purpose of maintaining a claim on behalf of the Western Shoshone for damages for the extinguishment of tribal title to lands in Nevada and California, including the lands at issue here. Following stipulation to a valuation date of July 1, 1872, the Commission determined the fair market value of the lands acquired from the Western Shoshone to be $21,550,000. *Western Shoshone Identifiable Group* v. *United States*, 29 Ind. Cl. Comm. 5 (1972).

The Western Shoshone Legal Defense and Education Association, an organization supported by petitioners, subsequently moved to stay the proceedings and present an amended claim. Specifically, the Association sought to delete from the claim lands to which it contended the Western Shoshone still retained aboriginal title. The Commission, "viewing the dispute as an internal one among the Western Shoshone over litigation strategy" (Pet. App. 4), denied the untimely motion. *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, 35 Ind. Cl.

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[1] The Indian Claims Commission Act authorized the Commission to hear and determine claims for damages for the taking of aboriginal land brought on behalf of any "Indian tribe, band, or other identifiable group of American Indians." § 2, 25 U.S.C. 70a (1976).

Comm. 457 (1975), aff'd, 531 F.2d 495 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976).

The Temoak Band, which had opposed the Association's motion to stay the Commission proceedings, then reversed its position and sought to stay the Commission's proceedings pending a determination of claims that the Western Shoshone retained aboriginal title to lands in Nevada. The Commission denied the motion and, in 1977, entered final judgment, awarding the Western Shoshone more than $26 million. *Western Shoshone Identifiable Group* v. *United States*, 40 Ind. Cl. Comm. 305, 311, 453 (1977). The Court of Claims affirmed (*Temoak Band of Western Shoshone Indians* v. *United States*, 593 F.2d 994 (1979)), and this Court denied a petition for a writ of certiorari (444 U.S. 973 (1979)).

2. The United States commenced this grazing trespass action in 1974, alleging that petitioners were grazing livestock on certain public lands in Nevada without a federal permit as required by regulations issued by the Secretary of the Interior pursuant to the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* Petitioners defended on the basis that they were Western Shoshone Indians and the tribe was the beneficial owner of the lands at issue. Pet. App. 2.

In 1980, after the Indian Claims Commission's judgment had become final, the district court ruled that the effect of that judgment was to extinguish Western Shoshone aboriginal title as of December 19, 1979, the date on which the Clerk of the Court of Claims had certified the Commission award to the General Accounting Office for payment. The court further ruled that petitioners had not been trespassing before that time. See 706 F.2d 919, 923 (1983).

The court of appeals reversed. Although Section 22 of the Indian Claims Commission Act, 25 U.S.C. 70u (1976), provides that the payment of any claim determined under

the Act "shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy," the court held that petitioners' aboriginal title claims were not barred because "payment" of the claim had not yet occurred. *United States* v. *Dann*, 706 F.2d 919 (9th Cir. 1983). The panel concluded that "payment" for the purposes of Section 22 would not occur until "Congress has taken its final look at the award and has either permitted a plan of distribution to become effective pursuant to 25 U.S.C. § 1403 or has legislated one." 706 F.2d at 926.

This Court reversed. *United States* v. *Dann*, 470 U.S. 39 (1985). Noting that the two fundamental purposes of the Indian Claims Commission Act were " 'to dispose of the Indian claims problem with finality' " (*id.* at 45 (quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)) and to transfer from Congress to the Commission "the responsibility for determining the merits of native American claims" (470 U.S. at 45), the Court held that "payment" under Section 22 was effected when the award was placed in a trust account for the benefit of the Western Shoshone. The Court added: "The Danns also claim to possess individual as well as tribal aboriginal rights and that because only the latter were before the Indian Claims Commission, the 'final discharge' of § 22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action. Though we have recognized that individual aboriginal rights may exist in certain contexts, this contention has not been addressed by the lower courts, and, if open, should first be addressed below. We express no opinion as to its merits." 470 U.S. at 50 (footnote omitted).

3. On remand, the district court allowed petitioners to file an amended complaint in which they again asserted tribal title to the lands and also maintained individual aboriginal claims. The government then moved for a pre-

liminary injunction to compel petitioners to remove all livestock from the disputed lands in excess of the number which they had formerly been permitted to graze under a federal grazing permit.

The district court rejected petitioners' tribal claim. It explained that they "are precluded from asserting the aboriginal title of the Western Shoshone Nation against the United States because of the effect of section 22(a) of the Indian Claims Commission Act resulting from the payment, on December 19, 1979, of the judgment" resulting from the proceeding before the Commission. Pet. App. 33.

As to individual aboriginal title, the court ruled that such rights were "established prior to December 19, 1979," although it added that "any subsequent effort by individual Western Shoshones to extend their individual occupancy or use could not extend the scope of established use and occupancy rights." Pet. App. 33. The court held that petitioners, in their own rights, "have established an individual aboriginal and treaty right to graze 598 head of cattle, plus calves, and 840 head of horses, plus foals, in common with permittees of the Bureau of Land Management upon the public domain." *Id.* at 34. Similarly, the court also held that petitioners, as beneficiaries of their father's estate, have "individual aboriginal and treaty rights, in common with the other heirs, to graze an additional 170 head of cattle, plus calves, and 10 head of horses, plus foals, upon the public domain in common with permittees of the Bureau of Land Management." *Id.* at 34-35. Such grazing rights were not subject to regulation by the Bureau of Land Management (BLM), the court added. *Id.* at 35. Petitioners were directed, however, to remove livestock in excess of the numbers allowed by the court's decision. *Ibid.*

4. Both sides appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. 1-25. The

court first rejected petitioners' tribal title claims (*id.* at 9-12) because Section 22(a) of the Indian Claims Commission Act provides that payment resolves "all claims and demands touching any of the matters involved in the controversy." The court noted that it "would have thought that the Supreme Court's decision would have shifted the focus of this case away from tribal aboriginal title and placed it squarely on individual aborginal title." Pet. App. 9. In any event, the court held, its prior opinion in *United States* v. *Gemmill*, 535 F.2d 1145, 1149 (9th Cir.), cert. denied, 429 U.S. 982 (1976), compelled the conclusion that Section 22(a) precludes petitioners from continuing to assert Western Shoshone aboriginal title following payment for the lands. Pet. App. 10.[2]

Turning to the individual aboriginal title issue, the court rejected the government's position that petitioners could not establish title. Relying upon *Cramer* v. *United States*, 261 U.S. 219 (1923), it ruled that the government's former policy of favoring individual Indian settlement on the public lands allowed individual Indians to acquire rights in those lands from the date upon which tribal title was extinguished until November 26, 1934, when the lands at issue were withdrawn from further entry pursuant to the Taylor Grazing Act. Pet. App. 17-19. Relying upon the Commission proceedings, the court concluded that "the most appropriate date for the extinguishment of tribal title to the lands" was July 1, 1872. *Id.* at 20. Consequently, overruling the district court's adoption of the 1979 date for

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[2] The court of appeals also held that Section 22(a) similarly barred petitioners from claiming any tribal rights under the Treaty of Ruby Valley (Treaty with Western Bands of Shoshonee Indians), Oct. 1, 1863, 18 (Pt. 3) Stat. 689, because "the Treaty of Ruby Valley conferred no individual rights." Pet. App. 24. It also noted that "the Treaty does not refer to grazing rights." *Ibid.*

determining the extent of petitioners' individual aboriginal title rights to graze cattle and horses on range lands, the court of appeals ruled that "[a]ny such aboriginal right * * * must have been acquired prior to the withdrawal of the lands from open grazing and their subjection to the regime of the Taylor Grazing Act" in 1934, and "must have been continuously exercised since that time." *Id.* at 22. Accordingly, the court of appeals concluded that "[t]he individual aboriginal land title of [petitioners] is restricted to land that they or their lineal ancestors who preceded them in interest actually occupied prior to November 26, 1934," and that any such grazing rights are restricted to the number and type of animals which were being grazed in 1934. *Id.* at 24-25.[3] The court of appeals remanded the case to the district court to make the requisite findings and enter a decree.

ARGUMENT

The court of appeals correctly resolved the questions petitioners present for review. The court of appeals' resolution of those issues does not conflict with any decisions of this Court or of any other court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioners assert (Pet. 15-17) that they may raise Western Shoshone tribal title as a defense in this grazing trespass action, notwithstanding this Court's determination in *United States* v. *Dann* that the United States has paid the Indian Claims Commission judgment awarding the Western Shoshone compensation for the lands at issue. The court of appeals properly rejected this contention.

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[3] The court also found that the exercise of petitioners' individual aboriginal grazing rights would be subject to reasonable regulation by BLM. Pet. App. 23.

Section 22(a) of the Indian Claims Commission Act, 25 U.S.C. 70u(a) (1976), provides in relevant part: "The payment of any claim, after its determination in accordance with this [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." In 1983, the court of appeals ruled that "the bar arising from a favorable claim determination takes effect upon the payment of the claim, pursuant to section 70u(a)" (706 F.2d at 925), but found that the claim had not yet been paid. This Court reversed, finding that the claim had been paid within the meaning of Section 22(a). 470 U.S. 39 (1985). The clear effect of this Court's ruling, in light of the context in which it was rendered, is that Western Shoshone tribal title may no longer be asserted against the United States under any circumstances.

Petitioners observe that most of this Court's discussion in its prior opinion focused on whether payment had occurred rather than on the effect of payment. But, as the court of appeals noted, "the Court's discussion did not take place in a vacuum." Pet. App. 9. Since the court of appeals had already concluded that payment of the claim would bar any further assertion of tribal title, there was no reason for this Court to address that matter in detail. Indeed, the preclusive effect of payment of a Commission judgment is plain from the face of Section 22(a)—such payment acts as "a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." Moreover, to allow any party to continue to assert Western Shoshone tribal title to the lands in question after payment of the Commission judgment, as petitioners seek to do here, would defeat the "chief purpose" of the Indian Claims Commission Act, which was, this Court found, " 'to dispose of the Indian claims problem with finality.' " *United States* v. *Dann*, 470

U.S. at 45 (quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)).

2. There is no merit to petitioners' contention (Pet. 18-21) that the application of Section 22(a) to bar their claims of tribal ownership violates due process. The claim that was the subject of the Commission proceedings was a collective tribal claim, not an aggregation of related individual claims on behalf of a class of similarly situated persons. Hence, petitioners were not entitled to be individually represented in the Commission proceedings. See 531 F.2d at 503-504.

Petitioners maintain that the Temoak Band should not have been recognized as the appropriate representative party for maintaining a claim in the Commission proceedings on behalf of all Western Shoshone. Like the underlying aboriginal title issue, however, that question was fully litigated in the Commission action. The Western Shoshone Legal Defense and Education Association, an organization with whom petitioners were affiliated (706 F.2d at 922), sought to intervene in those proceedings to challenge the Temoak Band's status as the representative party and to assert allegations that the Western Shoshone had been misled concerning the claim. The Court of Claims, however, affirmed the Commission's denial of the petition, finding the Temoak Band to be the appropriate representative of the entire Western Shoshone and that the Association's allegations of fraud and collusion were unfounded. The court also rejected the Association's due process challenge to the constitutionality of the Indian Claims Commission Act (531 F.2d at 497-504), and this Court denied a petition for a writ of certiorari (429 U.S. 885 (1976)). In short, petitioners' contentions regarding the alleged lack of due process in the Commission proceedings have already been fairly and fully litigated in

those proceedings, so those contentions may not be relitigated here.

Furthermore, as the Court of Claims twice emphasized, its orders denying intervention and, later, barring the Temoak Band's efforts to alter its litigation position, rested upon the unjustified tardiness of the procedural maneuvers; those orders were not based upon any unwillingness to consider a representational dispute timely presented or to allow an Indian group to contend that it still retained title to ancestral lands. 531 F.2d at 498-499 & n.6, 502-503 & nn.13, 14, 504 & n.18; 593 F.2d 994, 997-999. Especially in light of the Court of Claims' determination that "no adequate excuse was offered for the long delay" (593 F.2d at 997 (see also 531 F.2d at 498-499, 501-502 & n.13)), neither the Commission's procedural rulings nor the preclusive effect which Congress has assigned to the judgment of the Commission offends due process.

3. Finally, petitioners contend (Pet. 21-26) that the court of appeals erred by concluding that the most appropriate date to be adopted as the date that tribal title to the lands in question was extinguished is July 1, 1872. However, because the representative party of the Western Shoshone stipulated to that date in the claims proceeding, that stipulation should also be given effect here. Contrary to petitioners' contention, the Commission award could not result in an extinguishment date of December 17, 1979, as the Commission did not have jurisdiction to award compensation for lands taken after August 13, 1946. See 706 F.2d at 928.

In any event, the alleged error worked in favor of petitioners here. If the extinguishment date were found to be 1979, petitioners still would be precluded from now asserting tribal title and, in addition, would be unable to assert any individual claims as well. As the court of appeals stated

(Pet. App. 21), individual aboriginal title may be established, if at all, only with the implied consent of the government and only after tribal title has been extinguished. The government's implied consent to the individual acquisition of the lands in question, however, was recalled when the subject lands were withdrawn pursuant to the Taylor Grazing Act in 1934. Hence, if tribal title continued to exist after 1934, as petitioners maintain, the lands would at no time have been available for individual aboriginal occupancy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

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October Term, 1989

MARY DANN AND CARRIE DANN,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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E. Rusco, *The Organization of the Temoak Bands*, XXV Nevada Hist. Soc. Q. 175 (Fall 1982) 4

STATEMENT

The Brief for the United States, at p. 9, contains a serious, material misstatement of the record that " . . . the underlying aboriginal title issue . . . was fully litigated in the Commission action." The entire record of the claims proceeding, up through 1974, including transcripts of all proceedings, was introduced as evidence in this action. Exhibits 8-D through 11-D. The question of whether the extinguishment (or even "taking") of aboriginal title was actually litigated in the Commission was a central issue in *Dann I*, which held:

> Whatever may have been the implicit assumptions of both the United States and the Shoshone Tribes during the litigation before the ICC, the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided.

United States v. Dann, 572 F.2d 222, 226-27 (9th Cir. 1978). The government sought to modify that holding in *Dann II* but the court of appeals reaffirmed it as the law of the case. 706 F.2d 919, 923-24 (9th Cir. 1983). And in the decision below, the court of appeals, citing its earlier holdings stated that "[i]t is true that the taking was not actually litigated . . . " Pet. App. 20.

The government's statement that "the underlying aboriginal title issue . . . was fully litigated in the Commission action" is simply not true. As explained in the Petition at 11-14, 18-20, there was no party or representative before the Commission with an interest in disputing that the aboriginal title was taken, particularly with regard to the subject lands continuously occupied by the Dann Band.

ARGUMENT

As to the First Question Presented

The Brief for the United States fails to address any of the issues which the Petition contends the court of appeals incorrectly held were precluded by the Court's prior opinion in *United States v. Dann*, 470 U.S. 39 (1985). It simply argues generally that the court of appeals was correct in concluding that the effect of that decision "is that Western Shoshone tribal title may no longer be asserted against the United States *under any circumstances*" Br. U.S. 8. (Emphasis added).

1. The Brief of the United States fails to explain how the complete discharge of all claims for past wrongs to Indians which it received in the Commission now gives it the right to demand the assistance of a court of equity to eject Indians whose lands it had neglected to steal in the past. The Danns are not making a claim of any kind against the United States by continuing to graze their cattle upon Western Shoshone lands any more than any of us are by our daily use and possession of our homes and other belongings. The discharge, as broad as it may be, is none-the-less a procedural bar against claims against the United States which has no effect upon Indians in continuous possession who have no need for a remedy against the government. That one in possession is barred from clearing title cannot alone justify ejectment by the beneficiary of the bar. *United States v. Gammache*, 713 F.2d 588 (10th Cir. 1933).

2. The Brief of the United States also fails to address the denial of the petitioners' right to present evidence that the government practiced, and had notice of, fraud

during and as a part of the ICC proceedings and knowingly breached the trust relationship in accepting the ICC award. This Court certainly did not hold in *Dann* that payment is effective notwithstanding fraud and breach of trust. Its reliance upon *Seminole Nation v. United States*, 316 U.S. 286 (1942), mandates the exact opposite conclusion. 470 U.S. at 49 and n.12.

3. Nor does the government state any justification for the court of appeals' sub silentio elimination of the district court's prerogative to limit the injunctive relief it gave the government on grounds of equity and good conscience. See Finding 25, Pet. App. 32.[1] This Court's decision in *Dann* certainly did not foreclose that chancellor's prerogative which the Court has always respected. See, *e.g.*, *TVA v. Hill*, 437 U.S. 153, 193-94 (1978).

As to the Second Question Presented

The Brief for the United States misconstrues the representative scheme in the claim proceeding and the due process argument of the Petition. *If* the present day land owning entity or some representative which had an interest in asserting the existing property interests of the entity had been before the Claims Commission,[2] then

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[1] While the court of appeals did not discuss this issue, it was raised and briefed by the parties in connection with the government's cross-appeal.

[2] During the pendency of the claims proceeding there was no organized entity which politically represented the Western Shoshone Nation. Earlier efforts by field representatives of the

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petitioners would not have had a right of access. However, that was not the situation. Only an undefined aggregation of individual descendants having an interest in a share of reparations for historical wrongs to their ancestors was actually represented through the Temoak Bands. Legal representation was financed by a contingency fee such that the attorneys for the undefined "group" were compensated in direct proportion to the amount of land they could show (or in this case simply agreed with the government) was taken. 25 U.S.C. 70n (1976 ed.). If the ICC was adjudicating titles and existing possessory rights, rather than merely quantifying reparation amounts, *some* party with an interest in protecting those titles and possessory rights should have been before the Commission. *Cf. Hansbury v. Lee*, 311 U.S. 32 (1940).

Neither the ICC nor the Court of Claims adequately addressed the constitutional due process issue of the Temoak Bands' ability to adequately represent all Western Shoshone interests in denying that intervention. The Court of Claims regarded the intervenor's constitutional argument as a "feint" which it disposed of on the

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Bureau of Indian Affairs to have the Traditional Council recognized under the Indian Reorganization Act as such an entity were overruled by mid-level bureaucrats who mistakenly believed that the Western Shoshone possessed no tribal lands. E. Rusco, *The Organization of the Temoak Bands*, XXV Nevada Hist. Soc. Q. 175 (Fall 1982). The majority of Shoshone who are dependent upon Western Shoshone tribal lands are not members of the Temoak Bands which for the most part represents urban Indians residing on Executive order lands. The Temoak Bands has never asserted jurisdiction over Western Shoshone aboriginal or treaty lands or claimed the authority to abandon any such lands. See Pet. 14, n.13.

grounds of latches. 531 F.2d 503-04.[3] It never addressed the problem that no entity having an interest in protecting existing property rights was before the Commission. Regardless of the determination made by the tribunals in the claims proceedings, a party facing preclusion from an earlier representative proceeding always has the right to challenge the adequacy of the representation in that proceeding. See, *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Harris v. Lewis*, 559 F. Supp. 943 (D.D.C. 1983); Fed. R. Civ. P. Advisory Committee Note to Amend Rule 23(c)(3) (1966); Restatement (Second) of Judgments, Sec. 86, Comment (h), Sec. 116.

As to the Third Question Presented

The Brief for the United States cites no authority for its proposition that, since the Temoak Bands stipulated that July 1, 1872 could be used as an average valuation date for convenience in determining the value of the Western Shoshone identifiable group claim in the ICC, that date should be used in this action as the actual date upon which Shoshone title to the specific lands used and occupied by the Danns was extinguished. Other than the court of appeals decision below that to do so would be "appropriate" there is no authority for the proposition that a stipulation entered for a limited purpose is binding for another purpose in collateral litigation. All authority

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[3] The latches argument advanced by the government (and the Court of Claims) might have some validity if there were a record that notice was given to parties in possession and an opportunity to be heard was afforded at some earlier date. There is no such record.

is to the contrary.[4] What is more, the Temoak Bands did *not* stipulate that tribal title was extinguished on that date as the government's brief suggests at p. 10, but only that the date could be used as the valuation date. See *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5,7 (1972).

The government's brief makes the preposterous argument that, even if tribal title was not effectively extinguished until 1979, the Danns would not be better off since individual aboriginal title can be established only with the consent of the government which withdrew its consent to occupation of the subject lands pursuant to the Taylor Grazing Act in 1934. The flaw in that argument is obvious. If Western Shoshone title to the subject lands was not extinguished until 1979, the Taylor Grazing Act, or other public land laws, did not apply to the subject lands before that date since they, as unextinguished aboriginal title lands of the Western Shoshone, were not public lands of the United States. *United States v. Dann (Dann II)*, 706 F.2d at 932; see, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919). (Secretary of Interior enjoined from treating aboriginal lands as public lands.)

The court of appeals did not agree that, if extinguishment of the title to the subject lands had not occurred until payment in 1979, the Taylor Grazing Act would have applied to the Danns' occupation prior to 1979. That

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[4] See, *e.g.*, *Anderson Clayton Co. v. United States*, 562 F.2d 972, 990-93 (5th Cir. 1977); *Jackson Jordan Co. v. Plasser American Corp.*, 747 F.2d 1567, 1576 (C.A. Fed. 1984); *Environmental Defense Fund v. Alexander*, 467 F. Supp. 885, 904-05 (D.C. Miss. 1979).

court found that the Taylor Grazing Act applied only because it incorrectly concluded that this Court's decision in *Dann* not only compelled a finding that tribal aboriginal title was precluded by payment, but also a finding that the extinguishment to the subject lands occurred prior to 1946. It found that title might be extinguished by the application of that Act *only* because it needed some date, Pet. App. at 20, n.6, not because the Act met the legal standards set by this Court for extinguishment of aboriginal title. *E.g., United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 353-54 (1941).

The district court below, on the other hand, concluded that, while assertion of tribal title was precluded after the United States was discharged by the payment, the law of the case, prior to payment, was that the tribal title to the lands occupied by the Danns' was unextinguished and their occupation at that time was with the knowledge and consent of the government.[5]

The predicate of individual aboriginal title as defined in *Cramer v. United States*, 261 U.S. 219 (1923) is "prior

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[5] Pet. App. 27, 28, 32-34. At any time before 1979, the government could not have ejected the Danns. The trespass damage claim for 1973-1974 was correctly dismissed by the Judgment of April 25, 1980 because prior to 1979 aboriginal title was unextinguished. CR-69. The government chose not to have this Court review the part of the decision of the court of appeals in *Dann II*, 706 F.2d at 928-33, which upheld the district court's ruling that there had been no extinguishment prior to the effect of the ICC discharge. Surely this Court did not intend to compel an ex post facto conversion of past occupation by the Danns which had been judicially determined to be lawful into trespass.

right" established before application of a conflicting grant. The fact that the Danns' prior right of occupancy derived from aboriginal title and was guaranteed by treaty rather than merely implied from a government regulation certainly did not weaken it.[6] As the Petition at 22-25 demonstrates, the Court's decision in *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339 (1941), dictates the correct analysis for determining how and when Western Shoshone title was relinquished as well as how the *Danns* individual rights of occupancy survived. The government's brief, like the decision below, simply ignores *Santa Fe Pacific* in spite of the fact that the Court cited that case in remanding this case for the determination of the individual aboriginal rights of petitioners. *United States v. Dann*, 470 U.S. 39, 50, n.13 (1985).

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[6] The court of appeals appears to believe that individual Indians cannot establish a right to occupy tribal lands. See, Pet. App. 14. The authority cited there, however, merely states that individual Indians cannot convey tribal lands and might have difficulty enforcing their individual occupancy rights *against the tribe*, F. Cohn, *Handbook of Indian Law* 605-06 (1982 ed.). The same authority recognizes that tribal custom or law may, and usually does, give exclusive occupancy of particular tracts to individuals. *Ibid.* at 610. If tribal custom gives individual Indians the right of occupancy, as was the case here, that right can be asserted against the government. Otherwise, the government could eject individual Indians from tribal lands one by one until there was no tribe.

CONCLUSION

The Writ of Certiorari should issue to review whether the court below misinterpreted this Court's prior mandate and whether the decision below conflicts with decisions of this Court.

Respectfully submitted this 15th day of September, 1989.

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